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Supreme Court, U.S.
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In the
Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
EUGENE VOLOKH
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

FRED A. ROWLEY, JR.
GRANT A. DAVIS-DENNY
ANDREW G. PROUT
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th fl.
Los Angeles, CA 90071

MARK B. FROST
Counsel of Record
RYAN M. LOCKMAN
Mark B. Frost & Associates
7 N. Columbus Blvd., 2d fl.
Philadelphia, PA 19106
(215) 351-3333
mfrost@mfrostlaw.com

QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey J. Heffernan respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit is reported at 777 F.3d 147 (3d Cir. 2015). App. 1a. The opinion of the U.S. District Court for the District of New Jersey is reported at 2 F. Supp. 3d 563 (D.N.J. 2014). App. 14a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on January 22, 2015. The Court of Appeals denied a timely petition for rehearing en banc on February 13, 2015. App. 72a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

The circuits are split 3-1 on a basic First Amendment question. Nonpolitical public employees such as police officers cannot be demoted for supporting a candidate in an election. But what if a public employee is demoted because his supervisor *mistakenly* believes he supports a candidate? Before this case, the Courts of Appeals unanimously held that the supervisor's mistake does not allow him to demote the employee. All three circuits that had addressed the question had concluded that a demotion based on the employee's *perceived* political association is just as contrary to the First Amendment as a demotion based on the employee's *actual* political association.

In this case, the Third Circuit has taken the opposite view. In the Third Circuit, a supervisor is now free to demote or even fire a public employee based on the supervisor's perception of the employee's political affiliation, so long as the supervisor's perception is incorrect.

The Third Circuit's view has chilling implications. Because of the decision below, public employees in the Third Circuit now have reason to fear taking any action that might cause them to be perceived—even incorrectly—as favoring a candidate or a political party. Any stray comment that gives the boss the wrong impression can be grounds for discharge. And the Third Circuit's view makes no practical sense. It rewards the careless supervisor, who is free to make kneejerk personnel decisions based on political considerations that would be off-limits to a supervisor who is careful to ascertain the facts before acting. When the government is wrong as a constitutional matter, it should not be off the hook because it also happens to be wrong as a factual matter. Two wrongs do not make a right.

The majority view among the Courts of Appeals is the correct one. When a public employee is demoted because his supervisor mistakenly believes the employee has taken sides in an election, the supervisor's motivation is just as illicit, and the damage to the employee just as great, as if the supervisor's perception was accurate.

1. Petitioner Jeffrey Heffernan has been a police officer with the Paterson, New Jersey, Police Department since 1985. By 2006 he worked as a detective in the office of Police Chief James Wittig. App. 2a.

Paterson held a mayoral election in 2006. The candidates were Jose Torres, the incumbent mayor, and Lawrence Spagnola, a former Paterson police chief. Heffernan was close friends with Spagnola, but he did not work on Spagnola's campaign, and he could not vote for Spagnola because he did not live in Paterson. Heffernan's supervisors in the Police Department, who supported Torres, knew about Heffernan's friendship with Spagnola. App. 3a.

Shortly before the election, Heffernan's bedridden mother asked him to drive into Paterson to obtain for her a large Spagnola campaign yard sign, to replace a smaller sign that had been stolen from her yard. Early in the afternoon, while he was off duty, Heffernan drove to a distribution point where campaign workers were giving out signs. Assembled were Spagnola supporters and Spagnola's campaign manager, Paterson City Councilmember Aslon Goow. Heffernan spoke briefly with Goow and took a campaign sign, which he delivered to his mother's house.

Arsenio Sanchez, a Paterson police officer assigned to Mayor Torres's security staff, happened to be driving by and saw Heffernan speaking with Goow and holding the sign. Sanchez immediately called Chief Wittig. Soon after, Mayor Torres also knew about Heffernan's activity. The very next day, Heffernan was demoted from detective to patrol officer, removed from the police chief's office, and assigned to a walking patrol post, as a punishment. His supervisors told him he was being transferred because of his support for Spagnola. In fact, Wittig himself admitted that he transferred Heffernan due to Heffernan's "overt[] involvement in a political election." App. 3a.

A few months later, Heffernan filed this § 1983 suit for retaliatory demotion in violation of his freedom of speech and of association. App. 3a.

2. A jury found in Heffernan's favor on the freedom of association claim. The jury awarded compensatory damages of $75,000—$37,500 each from Chief Wittig and Mayor Torres—and an additional $30,000 in punitive damages, half from Wittig and half from Torres. App. 4a, 18a. After trial, however, the District Judge retroactively recused himself based on what he believed to be a conflict of interest. App. 4a. The verdict was vacated and the case was reassigned to a different judge, who granted summary judgment for the respondents. App. 66a. That decision was reversed by the Third Circuit. App. 57a. On remand, the case was reassigned to yet another District Judge. There was a new round of briefing on the parties' cross-motions for summary judgment. App. 21a.

3. The District Court granted the respondents' motion for summary judgment. App. 14a-54a.

The District Court held that Heffernan had no cause of action based on his *actual* speech or association, because he had not actually campaigned for Spagnola. App. 24a-33a, 43a-45a. The District Court also held that Heffernan could not state a cause of action based on his supervisors' incorrect perception of his *speech*, because Third Circuit precedent did not allow recovery on such a theory. App. 33a-35a.

In the portion of its opinion relevant to this petition, the District Court determined that Third Circuit precedent also foreclosed a First Amendment retaliation claim based on a perceived-association theory—i.e., based on an employer's mistaken belief as to an employee's political association. App. 46a (citing *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002)). The District Court observed that the law was precisely the opposite in the Sixth Circuit, which "has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim." App. 47a (citing *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012)). The District Court noted that in *Dye* the Sixth Circuit had "explicitly disapproved the reasoning of the Third Circuit." App. 48a. The District Court acknowledged:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with the same un-

> constitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space.

App. 51a-52a (footnote omitted).

The District Court also noted that in *Dye* the Sixth Circuit had relied on cases from the First and Tenth Circuits, *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008), and *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008). App. 48a-51a. In the District Court's view, however, neither of these cases unambiguously endorsed a perceived-association claim as the Sixth Circuit had. App. 48a-51a.

4. The Court of Appeals for the Third Circuit affirmed. App. 1a-13a.

The Third Circuit agreed with the District Court that Heffernan had no cause of action based on his actual speech or association, because he had not campaigned for Spagnola. App. 8a-11a. The Third Circuit also agreed that circuit precedent foreclosed a claim based on his supervisors' incorrect perception of Heffernan's speech. App. 11a.

On the perceived-association theory, the Third Circuit held that a retaliatory demotion violates the First Amendment only where it is based on an employee's *actual* political association. App. 12a-13a.

This was so, the court reasoned, because "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." App. 13a (brackets and citation omitted). The Third Circuit concluded that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information.'" App. 13a (quoting *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

Like the District Court, the Third Circuit noted that in *Dye* the Sixth Circuit had reached the opposite conclusion. App. 12a. The Third Circuit agreed with the District Court that neither the First nor the Tenth Circuit had clearly endorsed the perceived-association theory. App. 12a.

The Third Circuit denied rehearing en banc. App. 72a.

REASONS FOR GRANTING THE WRIT

Demotions "based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990); *see also Branti v. Finkel*, 445 U.S. 507, 517 (1980). A public employee in a nonpolitical position is free to support one candidate or another, or indeed neither, without fear of being disciplined. But may he be disciplined because his supervisor *perceives* a political affiliation that does not in fact exist? This question has divided the circuits.

The answer will have important consequences for millions of government employees. If the majority view among the Courts of Appeals is correct, government employees need not worry about the political views their supervisors might ascribe to them. But if the Third Circuit's view is correct, government employees had better not discuss politics. If the boss is left with the mistaken impression that an employee is a Democrat, or a Republican, or anything else, the employee can be fired. Public employees need to avoid even acting or talking in any way that a supervisor might *think* is characteristic of Democrats or Republicans, because if the supervisor gets a misimpression about the employee's political associations, the employee can be fired. A rule with such bizarre consequences cannot be right.

I. The circuits are split 3-1 on whether a public employer violates the First Amendment by demoting an employee in retaliation for what the employer mistakenly perceives as political association.

In the First, Sixth, and Tenth Circuits, a government employee may not be demoted on the grounds of his political affiliation, even if the supervisor is mistaken in ascribing political affiliation to the employee. The rule is different in the Third Circuit, where the supervisor is immune from liability if he is mistaken. The Third and Sixth Circuits have each explicitly rejected the other's view. App. 12a; *Dye*, 702 F.3d at 300. Commentators have recognized the conflict as well. *See* Nicholas A. Caselli, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. Chi. L. Rev. 1709, 1710 (2014) ("While the First, Sixth, and Tenth Circuits have permitted perceived-affiliation claims, the Third Circuit has barred such actions."); Kaitlyn Poirier, *Constitutional Law—The First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation*, 81 Tenn. L. Rev. 367, 377 (2014) (referring to the "circuit split on the issue of whether employer retaliation based on political non-association or perceived political association is a recognizable legal claim").

A. In the First, Sixth, and Tenth Circuits, a public employee may bring a First Amendment retaliation claim if he is demoted because his supervisor mistakenly perceives that he supports a political candidate.

The First, Sixth, and Tenth Circuits hold that perceived political association is not a permissible ground for demoting a public employee.

In *Dye*, the Sixth Circuit case, racing stewards employed by the state of Michigan were demoted and fired because their Democratic supervisors mistakenly believed they supported the Republican candidate for governor. *Dye*, 702 F.3d at 292. The court explained that these facts "present us with an issue of first impression for our court: whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue. We believe that they do not." *Id.*

The Sixth Circuit reasoned that "the critical inquiry in certain political-affiliation retaliation cases is the motivation of the employer," *id.* at 299, rather than the conduct of the employee. The court found "ample evidence to support the stewards' contention that [their supervisors] attributed a political affiliation to the stewards." *Id.* at 302. The Sixth Circuit concluded that "[a]n employer that acts upon such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.*

The Sixth Circuit recognized that the Third Circuit "has rejected a perceived-support theory." *Id.* at 299. But the Sixth Circuit determined that the Third Circuit's view rested upon a misinterpretation of *Waters v. Churchill*, 511 U.S. 661 (1994). *Dye*, 702 F.3d at 300. The Third Circuit had "relied upon the following statement in *Waters*: '[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information.'" *Id.* at 299 (quoting *Ambrose*, 303 F.3d at 495 (in turn quoting *Waters*, 511 U.S. at 679)). The Sixth Circuit labeled the Third Circuit's reliance on *Waters* "disingenuous," however, because "[w]hen read in context, it is clear that this sentence relates only to due-process violations," not to First Amendment claims. *Dye*, 702 F.3d at 300. The Sixth Circuit accordingly found "the Third Circuit's conclusion unpersuasive." *Id.*

In *Gann*, the Tenth Circuit case, an administrative assistant to a county commissioner was fired because she had not campaigned for the commissioner in the recent election. *Gann*, 519 F.3d at 1091-92. The Tenth Circuit held that the assistant's actual political affiliation was "irrelevant," *id.* at 1094, because "our only relevant consideration is the impetus for the elected official's employment decision vis-à-vis the plaintiff, i.e., whether the elected official prefers to hire those who support or affiliate with him and terminate those who do not." *Id.* The Tenth Circuit rejected the county commissioner's defense that because the assistant had "never made her political non-affiliation known to him," there was no causal link between the assistant's political beliefs and her firing. *Id.* The important thing, the court held, was not the assistant's actual beliefs, but rather that her firing was politically motivated—that the commissioner's action "was motivated by the fact that she did not actively campaign for him." *Id.* at 1095.

In *Welch*, the First Circuit case, a police detective was demoted for failing to support a recall campaign. *Welch*, 542 F.3d at 933-35. The First Circuit rejected the defense that there could be no First Amendment claim because the detective had not taken either side in the election. *Id.* at 938. It was enough that his supervisors believed that he was on the opposite side, even if the supervisors were wrong. "In this case," the First Circuit held, the detective "adduced evidence that officers who did not support the recall election were perceived as opposing it. Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that affiliation." *Id.* at 939.

The Sixth and Third Circuits have taken conflicting views of *Gann* and *Welch*. The Sixth Circuit reads the two cases the same way we do, as standing for the proposition that "retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine." *Dye*, 702 F.3d at 300. The Third Circuit reads *Gann* and *Welch* differently, as holding merely that "an employer may not discipline an employee based on the decision to remain politically neutral or silent." App. 12a. The Third Circuit's view is unduly narrow. It is based on the circumstance that the employees in the two cases, like Detective Heffernan in our case, happened to be neutral in an election campaign. But the holdings of *Gann* and *Welch* are not merely that neutrality is a constitutionally protected position. Both cases clearly state that a supervisor may not demote an employee based on the supervisor's perception of the employee's political association, whether or not the supervisor's perception is accurate.[1]

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[1] In any event, even if one takes the Third Circuit's view of *Gann* and *Welch*, there is still a square conflict between the Sixth Circuit's decision in *Dye* and the Third Circuit's decision below.

B. In the Third Circuit, the government is free to demote an employee based on a supervisor's mistaken belief as to the employee's political association.

In the decision below, the Third Circuit became the only Court of Appeals to hold that a supervisor's factual mistake allows the government to demote an employee based on the employee's political association.

The Third Circuit took the first step toward this result in *Fogarty v. Boles*, 121 F.3d 886, 890-91 (3d Cir. 1997), in which it held that demotion for perceived *speech* does not violate the First Amendment. The court took a second step in *Ambrose*, in which it found no First Amendment violation where a police officer was suspended in retaliation for a particular kind of perceived speech—the officer's perceived support of a fellow officer's lawsuit against the town. *Ambrose*, 303 F.3d at 490, 495-96.

In the decision below, the Third Circuit extended *Fogarty* and *Ambrose* to immunize the government from liability for demoting an employee for his perceived support of a political candidate. The Third Circuit reasoned that because Heffernan had not actually supported Spagnola in the election, his freedom of political association could not have been abridged when his supervisors demoted him based on their misperception that he had supported Spagnola. App. 12a-13a. "[I]t is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information,'" the Third Circuit held, "even where the government employer erroneously believes that the employee had engaged in protected activity under the First Amendment." App. 13a (citing *Waters*, 511 U.S. at 679).

In his petition for rehearing en banc, Heffernan explained that the Third Circuit is the only circuit to take this view, and that the law in the First, Sixth, and Tenth Circuits is the opposite. But the Third Circuit denied rehearing en banc. App. 72a. This Court is the only one that can resolve the conflict.

II. The decision below drastically curtails the First Amendment rights of government employees.

The Third Circuit's decision in this case will have disastrous consequences for public employees. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee can constitutionally be fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees have to worry about saying the wrong thing at the office, for fear of leaving the boss with the wrong impression. Indeed, they have to worry about *anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other. If the Third Circuit is right, it would be risky for a government employee to mention a story she saw on Fox News (for fear her boss might think she is a Republican) or a story she heard on NPR (for fear her boss might think she is a Democrat). The jokes employees tell at work, the hobbies they pursue, the kinds of music they listen to—all are fodder for dismissal by a politically-motivated boss, if the Third Circuit is correct that the First Amendment offers no protection. Every workday will bring a new challenge. Does an employee dare to drive a pickup truck, or a Prius? Does she let coworkers know she enjoys country music, or rap? Does she admit to being a member of the National Rifle Association, or the Sierra Club? The Third Circuit's decision drastically curtails the First Amendment rights of public employees.

And for what purpose? The Third Circuit's decision rewards the careless or stupid supervisor, who is authorized to indulge his every whim concerning the political beliefs of his employees. The careless supervisor has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The decision below perversely encourages a strange form of McCarthyism, in which government employers are free to make wild, baseless accusations about an employee's political beliefs, and are actually rewarded when they are *incorrect*. The Third Circuit's rule makes no sense. Where the state is wrong as a constitutional matter, it should not be absolved because it also happens to be wrong as a factual matter.

The Third Circuit believed, App. 13a, that these bizarre consequences are commanded by a single sentence in *Waters v. Churchill*, 511 U.S. 661, 679

(1994): "We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." But the Third Circuit took this sentence out of context. The sentence appears in a paragraph that is about the Due Process Clause, not the First Amendment. The very next sentence in the paragraph reads: "Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure." *Id.* This paragraph of *Waters* simply states that an innocent mistake of fact does not by itself amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other provisions of the Constitution.

The actual holding of *Waters* supports the view of the First, Sixth, and Tenth Circuits, not the Third. *Waters* held that where a public employee is fired due to a supervisor's misperception of what the employee said, it is the supervisor's perception that matters. *Id.* at 679-80. The same is true here. The First Amendment is violated where an employer demotes an employee based on the supervisor's perception of the employee's political affiliation, whether or not that perception is correct. As the Court explained in *Branti*, "there is no requirement that dismissed employees prove that they ... have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S. at 517. To prove a First Amendment violation, employees need only show that the employer was motivated by an impermissible purpose. *Id.*

The Third Circuit believed that because Heffernan had not actually engaged in any political association, his supervisors could not have abridged his freedom of association by punishing him. As the Third Circuit put it, "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." App. 13a (quotation marks and brackets omitted). But this view is mistaken. The First Amendment protects the *freedom* of association, not just the act of associating. Heffernan had a First Amendment right to engage in the very conduct for which his supervisors demoted him, even if he did not engage in it in this particular instance. To allow his supervisors to punish Heffernan for the purpose of deterring him from political participation will chill actual political participation on the part of countless other public employees on other occasions.

The First Amendment can hardly permit careless supervisors to punish employees where better-informed supervisors could not. When a public employee is demoted because his supervisor wrongly believes the employee has taken sides in an election, the supervisor is at fault just as much as he would have been if the employee actually had taken sides. The employee is harmed just as much. And the damage to all employees' First Amendment rights is at least as great, and likely greater, because of the dire consequences of giving the boss the wrong impression.[2]

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[2] This case no longer involves any question of perceived *speech*, which raises a different set of issues from perceived *association*. Demotion for perceived speech does not threaten to chill speech

III. This issue recurs frequently and affects millions of government employees.

The issue is a recurring one, because government employees frequently bring § 1983 claims based on perceived political association. *See, e.g., Holsapple v. Miller*, 2014 WL 525391, *6 (E.D. Mich. 2014) ("it does not matter whether Holsapple openly supported Lee in the Sheriff election or not, only that he was perceived to do so by Sheriff Miller"); *Hein v. Kimbrough*, 942 F. Supp. 2d 1308, 1313 (N.D. Ga. 2013) (describing the question presented as "would a termination of plaintiff based on his perceived support for the defeated sheriff run afoul of the First Amendment"); *Albino v. Municipality of Guayanilla*, 925 F. Supp. 2d 186, 197 (D.P.R. 2013) (First Amendment retaliation claim based on "perceived political affiliation"); *Police and Fire Ret. Sys. v. City of Detroit*, 2011 WL 5307594, *1 (E.D. Mich. 2011) (First Amendment retaliation counterclaim based on "perceived political affiliation" with former mayor);

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the way that demotion for perceived association threatens to chill association. Whether an employee has engaged in speech is usually an easily-answered empirical question. In most cases there is little danger that a supervisor will come to the wrong conclusion about whether an employee has spoken, so employees will have little reason to fear giving the boss the wrong impression. Association is more subtle and more prone to misperception, because virtually any behavior on the part of an employee can give rise to a misimpression about the employee's political leanings. The practical differences between speech and association are already reflected in this Court's cases, which apply very different doctrinal frameworks in the two areas. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996).

Silverstein v. Lawrence Union Free School Dist., 2011 WL 1261122, *4 (E.D.N.Y. 2011) (First Amendment retaliation claim based on plaintiff's "political affiliations and/or perceived political affiliations"); *Poindexter v. Bd. of Cnty. Comm'rs*, 548 F.3d 916, 919 (10th Cir. 2008) (First Amendment retaliation claim based on "perceived political affiliation"); *Rebrovich v. Cnty. of Erie*, 544 F. Supp. 2d 159, 170 (W.D.N.Y. 2008) (First Amendment retaliation claim arising from plaintiff's allegation that defendant "harassed him based on a perceived political association with the former administration"); *Harp v. DeStefano*, 2007 WL 2869831, *6 n.5 (D. Conn. 2007) (finding "sufficient basis to assert a retaliation claim based upon Harp's perceived political associations"); *Ramirez v. Arlequin*, 357 F. Supp. 2d 416, 424 (D.P.R. 2005) (First Amendment retaliation claim based on "perceived political affiliations"), *rev'd in part on other grounds*, 447 F.3d 19 (1st Cir. 2006); *Good v. Bd. of Cnty. Comm'rs*, 331 F. Supp. 2d 1315, 1325 (D. Kan. 2004) ("The court must first consider whether plaintiff's right of association claim based upon the perception of the defendants constitutes a claim cognizable under the First Amendment."), *aff'd sub. nom. Good v. Hamilton*, 141 F. Appx. 742 (10th Cir. 2005).

There are 21.8 million public employees in the United States. U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 2 (Dec. 2014), www2.census.gov/govs/apes/2013_summary_report.pdf. The vast majority of them occupy nonpolitical positions—they are teachers and firefighters, nurses and letter carriers, bus drivers and police officers. The answer to the question presented will profoundly shape the environment in which they work. Few constitutional questions have such direct impact on the everyday lives of so many people.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART BANNER
EUGENE VOLOKH
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

FRED A. ROWLEY, JR.
GRANT A. DAVIS-DENNY
ANDREW G. PROUT
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th fl.
Los Angeles, CA 90071

MARK B. FROST
Counsel of Record
RYAN M. LOCKMAN
Mark B. Frost & Associates
7 N. Columbus Blvd., 2d fl.
Philadelphia, PA 19106
(215) 351-3333
mfrost@mfrostlaw.com

APPENDIX A

United States Court of Appeals,
Third Circuit.

Jeffrey J. HEFFERNAN, Appellant

v.

CITY OF PATERSON; Mayor Jose Torres; Police Chief James Wittig; Police Director Michael Walker.

No. 14–1610

Submitted Under Third Circuit L.A.R. 34.1(a) Dec. 11, 2014

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Alexandra M. Antoniou, Esq., Mark B. Frost, Esq., Ryan M. Lockman, Esq., Emily K. Murbarger, Esq., Mark B. Frost & Associates, Philadelphia, PA, Counsel for Appellant.

Victor A. Afanador, Esq., Lite, De Palma, Greenberg, Newark, NJ, Counsel for Appellees City of Paterson & Michael Walker.

Susana Cruz–Hodge, Esq., Lite, De Palma, Greenberg, Newark, NJ, Counsel for Appellee City of Paterson.

Albert C. Lisbona, Esq., Dwyer, Connell & Lisbona, Fairfield, NJ, Counsel for Appellee Jose Torres.

Gary Potters, Esq., Potters & Della Peitra, Fairfield, NJ, Counsel for Appellee Jose Torres.

Anthony V D'Elia, Esq., Mitzy R. Galis–Menendez, Esq., Roosevelt Jean, Esq., Chasan, Leyner & Lamparello, Secaucus, NJ, Thomas P Scrivo, Esq., McElroy, Deutsch, Mulvaney & Carpenter, Newark, NJ, Counsel for Appellee James Witting.

Before: VANASKIE, GREENBERG, and COWEN, Circuit Judges.

VANASKIE, Circuit Judge.

Appellant Jeffrey Heffernan, a police officer in Paterson, New Jersey, was demoted after being observed obtaining a local mayoral candidate's campaign sign at the request of his mother. He brought this action under 42 U.S.C. § 1983 against Appellees, including the City of Paterson, then-Mayor Jose Torres, Police Chief James Wittig, and Police Administrator Michael Walker, for unconstitutional retaliation under the First Amendment. Heffernan now appeals from the District Court's grant of summary judgment in favor of Appellees. Because Heffernan has failed to come forward with evidence that he actually exercised his First Amendment rights, and because claims of retaliation based only on the perceived exercise of those rights are foreclosed by *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997), we will affirm the District Court's order.

I.

Heffernan joined the Paterson Police Department in 1985, and received various commendations for his police work over the next 20 years. In late 2005, he was promoted to detective and assigned to an administrative detail in the office of the Chief of Police. The events giving rise to this case occurred in April 2006, at a time when Lawrence Spagnola, a former Paterson police chief and close friend of Heffernan's, was pursuing a bid to unseat the then-incumbent mayor, Jose Torres. Heffernan, despite personally hoping that Spagnola would win the election, was unable to vote for Spagnola based on his city of residence, did not "work[ ] on" the campaign, (App. 2089), and did not consider himself "politically involved" with the campaign, (App. 486).

On April 13, 2006, Heffernan's bedridden mother asked Heffernan to drive into downtown Paterson to pick up a large Spagnola campaign sign, to replace a smaller one that had been stolen from her lawn. That same day, Heffernan contacted Spagnola's campaign manager to arrange a time and place when he could pick up a lawn sign. He then drove into Paterson, picked up the lawn sign from a distribution point at which Spagnola supporters and campaign staff were present, and brought the sign to his mother's house, where he left it for another family member to erect.

A Paterson police officer assigned to the security staff of Mayor Torres—Spagnola's opponent—observed Heffernan's brief encounter with the Spagnola campaign manager. Word spread quickly, and the next day, one of Heffernan's supervisors confronted him about his interaction with Spagnola's campaign staff. Heffernan protested that he "wasn't politically involved[,]" and was "just picking up a sign for [his] mom." (App. 486–87.) Nonetheless, Heffernan was immediately demoted to a "walking post" because of his "overt [ ] involvement in a political election." (App. 217.)

In August 2006, Heffernan filed this § 1983 action in the District of New Jersey, seeking compensatory and punitive damages based on Appellees' alleged

First Amendment violations. Although the precise nature of the claims articulated in Heffernan's complaint was the source of lengthy debate before the District Court, neither party appeals from that Court's most recent conclusion that the complaint states claims for (1) retaliatory demotion based on Heffernan's exercise of the right to freedom of speech, and (2) retaliatory demotion based on his exercise of the right to freedom of association.

The parties filed cross-motions for summary judgment. Judge Sheridan, who was originally assigned to this matter, denied both motions without permitting the filing of briefs in opposition. For reasons that are not entirely clear, Heffernan proceeded to trial on only his free-association claim, which resulted in a jury verdict of $105,000 in his favor. After trial, however, Judge Sheridan retroactively recused himself based on what he concluded was a conflict of interest and vacated the jury's verdict.

The case was reassigned to Judge Cavanaugh, who revisited the parties' motions for summary judgment but, like Judge Sheridan, did not allow briefing beyond the original filings. He then granted summary judgment for Appellees on the free-expression claim, but entirely failed to address the free-association claim—i.e., the claim on which the jury had returned a verdict in Heffernan's favor. On appeal, a panel of this Court concluded that the District Court had erred by granting summary judgment without permitting the parties to file briefs in opposition, and by failing to consider the viability of Heffernan's free-association claim. 492 Fed. Appx. 225 (3d Cir. 2012).

On remand, the case was reassigned yet again, this time to Judge McNulty, who permitted a full round of fresh briefing on the parties' cross-motions for summary judgment. In an opinion filed on March 5, 2014, Judge McNulty concluded that Heffernan had adequately pleaded and prosecuted his free-association claim. He nonetheless found that Heffernan had failed to produce evidence that he actually exercised his First Amendment rights, and in the alternative, Heffernan was foreclosed from seeking compensation under § 1983 for retaliation based only on the perceived exercise of those rights. Accordingly, Judge McNulty granted summary judgment in favor of Appellees on all counts. Heffernan filed a timely notice of appeal.

II.

The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction under 28 U.S.C. § 1291. Our review of the District Court's order granting summary judgment is plenary. *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 134 (3d Cir. 2013). Summary judgment is appropriate where the movant establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). We view the evidence "'in the light most favorable to the nonmoving party.'" *Trinity Indus., Inc.*, 735 F.3d at 134–35 (quoting *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010)).

III.

The First Amendment generally prohibits a public employer from disciplining, demoting, or firing an employee based on that employee's exercise of First Amendment rights, including speaking out on a matter of public concern or engaging in expressive conduct to the same effect, *see Fogarty*, 121 F.3d at 888, or associating with a particular political party, *see Goodman v. Pa. Turnpike*, 293 F.3d 655, 663–64 (3d Cir. 2002) (citing *Rutan v. Rep. Party of Ill.*, 497 U.S. 62, 75, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)).[1] This appeal raises three issues: (1) whether the District Court erred by considering Appellees' motion for summary judgment on Heffernan's free-association claim; (2) whether the record contains evidence upon which a jury could find that Heffernan actually exercised his free-speech or free-association rights when he picked up a political sign as a favor for his mother; and (3) whether Heffernan nonetheless may obtain relief for the violation of a constitutional right under § 1983 even where he did *not* exercise any First Amendment right, but his employer mistakenly believed he did.

A.

Heffernan first argues that the District Court should not have considered Appellees' motion for summary judgment on his free-association claim, and should instead have allowed that claim to proceed to trial without further scrutiny. In support of this unusual proposition, he notes that a jury already returned a verdict—albeit one vacated on procedural grounds—in his favor. Therefore, according to Heffernan, the free-association claim must have had sufficient factual support to permit that verdict.

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[1] The primary exceptions, not relevant here, are where the government's concern "with the effective and efficient fulfillment of its responsibilities to the public" outweighs the employee's free-speech rights, *Fogarty*, 121 F.3d at 888, or where "party affiliation is an appropriate requirement for the position involved," *Goodman*, 293 F.3d at 663.

Heffernan believes we acknowledged as much in our previous opinion in this case. There, we ordered that on remand, the District Court, along with deciding whether Heffernan had adequately "pleaded and prosecuted" his free-association claim, "should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial." 492 Fed. Appx. at 230. The lack of a reference to summary judgment, in Heffernan's view, bolsters his argument that the District Court erred by considering Appellees' motion as to the free-association claim.

This is a misreading of our opinion. On the previous appeal, it was apparent that the District Court had made two reversible errors. First, the Court granted summary judgment for Appellees on Heffernan's free-speech claim without permitting Heffernan to file a brief in opposition; second, the Court's opinion made no reference whatsoever to Heffernan's still-pending free-association claim. As a result, we ordered the District Court "to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow opposition and reply briefing." *Id.* at 229. The portion of the opinion on which Heffernan relies simply directed the District Court to consider Appellees' argument that Heffernan had not adequately pleaded or prosecuted his free-association claim—which to that point had been overlooked in the case's complicated procedural history. In sum, our disposition of that appeal had no bearing on Appellees' right to contest the sufficiency of Heffernan's evidence on his free-association claim through a motion under Rule 56 for summary judgment.

Moreover, Appellees filed a timely motion under Rule 56 even before the first trial in this case. They did not receive the benefit of a procedurally sound ruling on that motion until it was considered by the District Court in the opinion that is the subject of this appeal. We thus reject Heffernan's argument that the District Court improperly considered the merits of Appellees' motion for summary judgment on his free-association claim.

B.

We next address whether the District Court properly granted summary judgment on Heffernan's free-speech and free-association claims insofar as they are predicated on the allegation that he suffered retaliation for actually engaging in speech or conduct protected under the First Amendment.

First, with respect to his free-speech claim, Heffernan must establish that: "(1) [he] spoke on a matter of public concern; (2) [his] interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the adverse employment decision would not have occurred but for the speech." *Fogarty*, 121 F.3d at

888 (citing *Green v. Phila. Housing Auth.*, 105 F.3d 882, 885 (3d Cir. 1997)). Here, the only element in dispute is the first—i.e., whether a jury could find that Heffernan actually spoke on a matter of public concern. We note that Heffernan need not prove he communicated a message *verbally*—and indeed, the record is devoid of such evidence—because expressive conduct also is protected under the First Amendment. Such conduct exists where "an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). "[T]his is a fact-sensitive, context-dependent inquiry, and ... the putative speaker bears the burden of proving that his or her conduct is expressive." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 161 (3d Cir. 2002) (citations and quotation marks omitted).

Heffernan's best argument here is that his actions had the *effect* of assisting Spagnola's campaign, and indeed, Torres's supporters construed his conduct as an expression of direct personal support for the campaign. But, as recognized by the District Court, this is only half the picture. Heffernan repeatedly disavowed anything resembling "an intent to convey a particularized message." For instance, at deposition, he denied "working on" Spagnola's campaign, (App. 2089), being "politically involved" with the campaign, (App. 486), or even "supporting [Spagnola] for mayor" at all, (App. 191). Instead, in his own description of the incident to a friend, "I was picking up a sign for my mother, and that's all I was doing." (App. 483.) In light of this unambiguous testimony, no room exists for a jury to find that Heffernan intended to convey a political message when he picked up the sign at issue. The District Court thus properly granted summary judgment on Heffernan's claim of retaliation based on the actual exercise of his free-speech rights.

Nor does Heffernan fare better on his free-association claim, which requires proof "(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." *Goodman*, 293 F.3d at 663–64 (citations and quotation marks omitted). The first and third elements are plainly established on the record before us. With respect to the second element, Heffernan maintains that his close friendship with Spagnola, his passive desire to see Spagnola win the election, and the belief of Spagnola's campaign manager that Heffernan was a "supporter" of the campaign, (App. 391), taken together, are sufficient to prove that he "maintained an association" with the Spagnola campaign.

For the same reasons described above, however, we conclude that Heffernan has failed to raise a genuine dispute of material fact on this point. Heffernan himself confirmed that regardless of what others may have perceived, he did not have any affiliation with the campaign other than the cursory contact necessary for him to pick up the sign for his mother. Consequently, the record is insufficient to allow a jury to return a verdict in Heffernan's favor on his claim of retaliation based on the actual exercise of his right to freedom of association. We will affirm the District Court's grant of summary judgment with respect to Heffernan's claim of retaliation based on the actual exercise of his free-association rights.

C.

In the alternative, Heffernan argues that he is entitled to proceed to trial on both claims under a "perceived-support" theory, i.e., where the employer's retaliation is traceable to a genuine but incorrect or unfounded belief that the employee exercised a First Amendment right. In other words, Heffernan asks us to eliminate a traditional element of a First Amendment retaliation claim—namely, the requirement that the plaintiff in fact exercised a First Amendment right.

That argument is squarely foreclosed by our own binding precedent, which holds that a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights. *See Ambrose v. Twp. of Robinson*, 303 F.3d 488, 496 (3d Cir. 2002); *Fogarty*, 121 F.3d at 891. All of our sister circuits to consider this issue in the context of a free-speech claim have reached the same conclusion. *See Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 662 (9th Cir. 2000); *Jones v. Collins*, 132 F.3d 1048, 1054 (5th Cir. 1998); *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990). Because Heffernan provides no convincing reason to distinguish these cases, the District Court correctly denied Heffernan's alternative basis for relief with respect to his free-speech claim.

Heffernan's last contention is that *Ambrose* and *Fogarty*, each of which addressed free-speech claims, leave room for us to conclude that he may seek relief under § 1983 on a perceived free-*association* claim. By way of example, he directs us to *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012), in which the Sixth Circuit addressed the employee-plaintiffs' claim of workplace retaliation based on their supposed affiliation with the Republican Party. There, the panel concluded that the employer's mere assumption of an affiliation, whether founded or not, was sufficient for the plaintiffs' claim to proceed. *Id.* at 299–300.

To begin with, we have no reason to believe that the holding of *Dye* can be reconciled with *Ambrose* and *Fogarty*—and nor did the Sixth Circuit. *See id.* at 300 ("[W]e find the Third Circuit's conclusion [in Ambrose] unpersuasive."). But beyond that, we are not convinced that *Dye* provides any reason to depart from our established holding on this point. Most notably, the *Dye* panel suggested it was "adopt[ing] the reasoning" of the First and Tenth Circuits in *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008), and *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008), both of which involved adverse employment actions taken against employees who did not adopt a position on a local political issue. *Dye*, 702 F.3d at 300. Like the District Court, however, we read *Welch* and *Gann* as natural applications of the settled First Amendment principle that an employer may not discipline an employee based on the decision to remain politically neutral or silent. *See Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272–73 (3d Cir. 2007). And indeed, the emphasis on that point in

Welch and *Gann* is, if anything, consistent with the admonition in *Ambrose* and *Fogarty* that a First Amendment retaliation claim under § 1983 must rest upon the actual exercise of a particular constitutional right—whether it be the right to speak on a political issue, to associate with a particular party, or to not speak or associate with respect to political matters at all.

Heffernan, however, has not presented evidence that he was retaliated against for taking a stand of calculated neutrality. Instead, he argues that Appellees demoted him on a factually incorrect basis. But it is not "a violation of the Constitution for a government employer to [discipline] an employee based upon substantively incorrect information," *Waters v. Churchill*, 511 U.S. 661, 679, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994), even where the government employer erroneously believes that the employee had engaged in protected activity under the First Amendment. To paraphrase our colleague, Judge Roth, "a [First Amendment] claim depends on [First Amendment protected conduct], and there was none in this case." *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (Roth, J., dissenting). Accordingly, we will affirm the District Court's grant of summary judgment with respect to Heffernan's claims insofar as they are based on a "perceived-support" theory of recovery.

IV

For the foregoing reasons, we will affirm the District Court's order of March 5, 2014 granting summary judgment in favor of Appellees.

APPENDIX B

United States District Court,
D. New Jersey

Jeffrey HEFFERNAN, Plaintiff,
v.
CITY OF PATERSON, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker, Defendants.

Civ. No. 06–3882 (KM)
Signed March 5, 2014

Alexandra Margaret Antoniou, Emily Kaplan Murbarger, Ryan Marc Lockman, Mark B. Frost & Associates, Philadelphia, PA, Gregg L. Zeff, Law Firm of Gregg L. Zeff, Mt. Laurel, NJ, for Plaintiff.

Albert C. Lisbona, Dwyer, Connell & Lisbona, Esqs., Fairfield, NJ, Victor A. Afanador, Lite Depalma Greenberg, LLC, Joseph M. Morris, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Newark, NJ, Mitzy Galis–Menendez, Roosevelt Jean, Chasan, Leyner, & Lamparello, PC, Secaucus, NJ, Thomas P. Scrivo, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Morristown, NJ, Alberto Rivas, for Defendants.

McNULTY, District Judge:

The plaintiff, Jeffrey Heffernan, a veteran police officer in the City of Paterson, was demoted following a report that he had picked up a lawn sign from a campaign worker for a mayoral candidate. Heffernan has made a number of claims, but the one that best fits the evidence is that the Defendants,[2] his employers, believed Heffernan had engaged in political speech or campaigning, when in fact he had not. At least one other Circuit has recognized a First Amendment claim for retaliation based on such a mistaken belief. The United States Court of Appeals for the Third Circuit, however, has rejected that "perceived support" rationale—explicitly as to free speech, and by strong implication as to freedom of association. As to this and related claims, Defendants and Plaintiff have moved for summary judgment. Following what I believe to be the law of this Circuit, I will enter summary judgment in favor of Defendants and against Heffernan.

FACTUAL BACKGROUND

The facts are stated briefly here, and developed in greater detail in the discussion of the issues.

The plaintiff, Jeffrey Heffernan, has been an officer in the Paterson Police Department since 1985. In 2005, he became a detective, assigned to the office of Police Chief James Wittig. At all relevant times, Defendant Jose Torres was the Mayor of Paterson and Defendant Michael Walker was the Police Director.

On April 13, 2006, Heffernan's mother, who was ill, asked him to bring her a lawn sign supporting the candidacy of Lawrence Spagnola (the former chief of police) for mayor of Paterson. She wanted to place the sign in front of her Paterson home. Heffernan called a campaign representative he knew. That representative suggested that Heffernan contact Spagnola's campaign manager, Councilman Aslon Goow, who was distributing signs around Paterson. Later that day, while off duty, Heffernan and his son drove to a street corner in Paterson to get a large lawn sign from Goow. (Pltf's 56.1 Statement ¶¶ 4, 7, 8; Dfd's Resp. Statement ¶¶ 4, 7, 8; see Pltf's Trial Testimony, Lockman Cert. (ECF No. 190–5) Ex. CC at A488). At the street corner, Heffernan spoke to Goow and obtained the sign for his mother. There is a dispute as to whether there was a gathering of Spagnola supporters at the corner. (Pltf's 56.1 Statement ¶ 10; Dfd's Resp. Statement ¶ 10).

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[2] Plaintiff seems to have agreed to voluntarily dismiss Police Director Michael Walker as a defendant in early 2009. (*See* Final Pretrial Order (ECF No. 53–1) at p. 44). I see no notice or order to that effect, however.

Officer Arsenio Sanchez, a member of defendant Mayor Torres's security detail (Sanchez Trial Testimony, Lockman Cert. *567 Ex. BB at A 276), was on traffic patrol at the time. Sanchez saw Goow, Heffernan, and Heffernan's son at the corner. (Pltf's 56.1 Statement ¶ 11 (citing Sanchez testimony)). There is a record of a cell phone call from Wittig to Sanchez minutes later. Sanchez denied under oath that he spoke with Wittig that day. (Lockman Cert. Ex. BB at A284–285) Wittig, however, testified in his deposition that he spoke to Sanchez, who advised him that "Heffernan was out hanging political signs in the second ward with Councilman Goow." (Wittig Dep. Tr., Afanandor Cert. (ECF No. 196–1) Ex. 5 at 75:18 to 76:21). Heffernan contends that Sanchez and Wittig did indeed speak about him in that call. (*Id.* at ¶¶ 13–14; Lockman Cert. Ex. BB at A292).

At any rate, word got back to the office. The parties agree that the next day, Lieutenant Patrick Papagni informed Heffernan that he was being transferred out of the Chiefs office. After Heffernan picked up his personal belongings, Papagni and Deputy Chief William Fraher told him that he was being demoted to walking patrol because of his political involvement with Spagnola. (Pltf's 56.1 Statement ¶ 34; Dfd's Resp. Statement ¶ 34). Wittig testified that Heffernan "breached his trust" as well as office policy by being "overtly involved in the political campaign." That political involvement, said Wittig, was the cause of his demotion. (Wittig Trial Testimony, Lockman Cert. Ex. DD at A644–646).

Heffernan seemingly did deliver the sign to his mother's home in Paterson. He did not display the sign or post it on his mother's property. (Dep. Testimony of Heffernan, Ex. S to Lockman Cert. (ECF No. 197–4) at A199 at 132:23–133:17).

Heffernan was a close friend of Spagnola. (Pltf's 56.1 Statement ¶ 5; Dfd's Resp. Statement ¶ 5). He "supported" Spagnola's candidacy in the sense that he wanted Spagnola to win, (Pltf's Testimony, Lockman Cert. Ex. CC at A486:17–23). Heffernan did not, however, live in Paterson and he was not eligible to vote there. (*Id.*). A campaign representative told Heffernan "it would help them out" if he met Goow at the street corner (*id.* at A488:7). Heffernan also testified that he believed he was associated with people in the campaign. (*Id.* at A637:13–15).

PROCEDURAL HISTORY

Heffernan filed this action on August 17, 2006. The case was initially assigned to District Judge Peter G. Sheridan. Shortly before trial, the defendants moved for summary judgment on the ground that Heffernan had not engaged in any protected speech. On April 3, 2009, Judge Sheridan denied that motion without the benefit of briefing by Heffernan. (ECF No. 62). In that ruling, Judge Sheridan remarked that Heffernan's claim more closely resembled a freedom-of-association claim (Opinion on the Record, Lockman Cert. Ex. F at A135–137) Defendants, at the outset of trial, expressed some surprise that any freedom-of-association claim was in the case. Trial Transcript, Lockman Cert. Ex. BB at A270–271). Judge Sheridan then clearly ruled that the Final Pretrial Order adequately set forth freedom of association as an issue to be tried, and that it would be tried. (*Id.*). *See also* pp. 14–17, *infra.* Following Judge Sheridan's ruling, the parties tried the case on the issue of whether Heffernan's freedom of association rights had been violated.

At the conclusion of that April 2009 trial, the jury entered a verdict against Mayor Torres and Chief Wittig. The jury found that Torres and Wittig had retaliated against Heffernan for exercising his first amendment right of association. It awarded $37,500 in compensatory damages against Torres, $37,000 against Wittig, and $15,000 in punitive damages against each. (ECF No. 76–77). Judgment was entered accordingly. (ECF No. 78). Heffernan, though victorious, moved for a new trial, arguing, among other things, that the Court erred by not allowing Heffernan to go forward with his freedom-of-*speech* claim. (ECF No. 80). Meanwhile, the Defendants appealed the judgment, arguing, *inter alia*, that Judge Sheridan erred in permitting Heffernan to go forward on a freedom-of-*association* claim. (ECF No. 83).

While post-trial motions were pending, Judge Sheridan became aware of a conflict of interest. Judge Sheridan acknowledged that his earlier work at a law firm created an appearance of impropriety and that "[t]he only recourse is to set aside the verdict, and permit a new trial before a different judge." (ECF No. 108). Judge Sheridan therefore entered an Order granting a new trial. (ECF No. 109–110). The case was then reassigned to District Judge Dennis M. Cavanaugh.

Judge Cavanaugh initially told the parties that he would not consider any dispositive pre-trial motions or permit the parties to re-raise issues previously decided. (ECF No. 143). The parties objected. A few weeks later, Judge Cavanaugh relented in part, and permitted the parties to re-file their earlier motions. (ECF No. 147). Torres and Wittig re-filed their earlier motions for summary judgment. (ECF No. 158, 159, 160). Judge Cavanaugh, unlike Judge Sheridan, granted the motions of Defendants Torres and Wittig for summary judgment. He held that Heffernan did not engage in any protected speech and thus had no cognizable First Amendment freedom-of-speech retaliation claim. (ECF No. 167–168). Judge Cavanaugh's opinion and order, however, did not address Heffernan's freedom-of-association claim, the one on which the jury had previously entered a verdict in Heffernan's favor.

Heffernan appealed. The Third Circuit reversed Judge Cavanaugh's judgment on August 7, 2012. (ECF No. 179). The Court of Appeals ruled that Judge Cavanaugh should have afforded Heffernan an opportunity to file papers in opposition to the renewed summary judgment motions. (*Id.* at 6).[3] The Court of Appeals also ruled that facts adduced at the April 2009 jury trial were relevant to summary judgment and should have been considered. Such evidence, "even [from a trial] involving a later recusal, [ ] is at least as reliable as other pieces of evidence, such as affidavits, that are routinely considered on summary judgment." (*Id.* at 8). Finally, the Court of Appeals ruled that "the able District Judge erred by failing to address Heffernan's Free Association Claim ... before entering judgment in favor of the Defendants." (*Id.* at 9).

The Court of Appeals remanded the case with instructions that the District Court (a) permit the filing of updated motions for summary judgment; (b) permit the filing of opposition and reply briefs; (c) freely consider evidence adduced at the 2009 trial in connection with those motions; and (d) determine whether the freedom of association claim is properly before the district court. (*Id.* at 8–10).

After remand, on May 17, 2013, this case was reassigned to me. (ECF No. 202) In accordance with the Court of Appeals' four-part mandate (*see supra*), (a) Defendants have submitted renewed motions for summary judgment; (b) the Court has accepted opposition and reply papers; (c) those papers have cited, and I have considered, evidence of record from the April 2009 trial; and (d) I have permitted Heffernan to assert his claim based on the right to freedom of association under the First Amendment.

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[3] Judge Sheridan denied Defendants' earlier summary judgment motions on the brink of trial, without the benefit of opposition briefing from Heffernan. At that time, Heffernan obviously had no cause for complaint. After Judge Sheridan granted a new trial and the case was first reassigned, Judge Cavanaugh permitted the parties to re-file earlier motions, but did not permit any further briefing. That left Heffernan in the posture of not having filed any opposition to Defendants' renewed summary judgment motions. Thus, when Judge Cavanaugh decided Defendants' renewed motions—this time *against* Heffernan—he did so without the benefit of briefing from Heffernan.

Currently before this Court are Defendants' renewed summary judgment motions, now fully briefed by both sides, as well as Plaintiff's motion for partial summary judgment. Heffernan contends that he was demoted in retaliation for his exercise of his First Amendment freedoms of speech and political association. Defendants assert that Heffernan did not speak or express himself at all, so no free speech claim is presented. Defendants add that no freedom of association claim was properly pled or otherwise asserted. In the alternative, however, they argue that any freedom-of-association claim should be dismissed on summary judgment. In addition, Defendants assert that, under Section 1983, the City of Paterson cannot be held vicariously liable for the actions of Wittig and Torres, the individual defendants remaining in this case, and that no evidence at all connects Mayor Torres to Heffernan's demotion. (*See* Dfd's Mot. for Summ. J. (ECF No. 189); Dfd's Opp. to Pltf's Mot. for Summ. J. (ECF No. 196); Dfd's Reply in Further Supp. (ECF No. 201)).

DISCUSSION

Heffernan argues that he suffered retaliation after exercising two First Amendment freedoms: freedom of association and freedom of speech. Upon review of the entire record, I find that the arguments of Defendants Torres and Wittig are correct under the law of this Circuit. I will enter summary judgment in their favor, and deny Heffernan's motion. That ruling renders moot the issue of whether the City of Paterson or Mayor Torres would have been derivatively liability for those alleged First Amendment violations.

A. Legal Standard on Motion for Summary Judgment

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S.Ct. 2548.

If the moving party meets its threshold burden, the opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *see also* Fed.R.Civ.P. 56(c) (setting forth types of evidence on which nonmoving party must rely to support its assertion that genuine issues of material fact exist). "[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); *see also Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001) ("A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial.").

When, as here, the parties file cross-motions for summary judgment, the governing standard "does not change." *Clevenger v. First Option Health Plan of N.J.*, 208 F. Supp. 2d 463, 468–69 (D.N.J. 2002) (citing *Weissman v. U.S.P.S.*, 19 F. Supp. 2d 254 (D.N.J. 1998)). The court must consider the motions independently, in accordance with the principles outlined above. *Goldwell of N.J., Inc. v. KPSS, Inc.*, 622 F. Supp. 2d 168, 184 (2009); *Williams v. Philadelphia Hous. Auth.*, 834 F. Supp. 794, 797 (E.D.Pa. 1993), *affd.*, 27 F.3d 560 (3d Cir. 1994). That one of the cross-motions is denied does not imply that the other must be granted. For each motion, "the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made" but does not "weigh the evidence or make credibility determinations" because "these tasks are left for the fact-finder." *Pichler v. UNITE*, 542 F.3d 380, 386 (3d Cir. 2008) (internal quotation and citations omitted).

B. Freedom of Speech Claim

Heffernan claims that Defendants retaliated against him for engaging in speech protected by the First Amendment, and has moved for entry of partial summary judgment. Defendants have moved for summary judgment dismissing this freedom-of-speech claim. The first issue is whether Heffernan *did* engage in protected speech or expression. The second is whether he nevertheless has a cause of action because Defendants retaliated against him based on their *belief* that he had engaged in protected speech or expression. I also consider whether Heffernan aided and abetted the speech of his mother.

1. Actual First Amendment speech

A public employee is protected by the First Amendment if he[4] can show that he suffered an adverse employment decision as a result of speaking on a matter of public concern, and that his First Amendment interest outweighs the government's concern "with the effective and efficient fulfillment of its responsibilities to the public." *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997) (citing *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 885 (3d Cir. 1997)). "This test is based on a series of cases in which the Supreme Court struck a balance between the employee's right to speak and the government-employer's duty to serve the public productively." *Id.* at 888–89 (citing, *inter alia, Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

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[4] Heffernan happens to be male. For simplicity, I will use the male pronoun even when, as here, speaking genetically.

The initial question is whether Heffernan engaged in protected speech. "[I]n the absence of protected speech, a public employee may be discharged even if the action is unfair, or the reasons "are alleged to be mistaken or unreasonable.""" *Id.* at 889 (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). In *Fogarty*, for example, the Third Circuit affirmed summary judgment against the plaintiff, a teacher, who lost his job after being accused of contacting a newspaper reporter about harmful pollution emanating from construction at the school. *Id.* at 887, 891. The teacher insisted that the principal's information was false; the teacher never spoke to the newspaper reporter. The teacher sued the principal, but lost on summary judgment. Affirming, the Third Circuit "conclude[d] that the absence of speech—in fact, its explicit disclaimer by plaintiff—is fatal to the plaintiffs claim." *Id.* at 891.

Here, too, Heffernan allegedly suffered an adverse employment action based on speech that, by his own account, did not occur. The alleged speech—political campaigning—would obviously constitute protected speech. But Heffernan has always denied any political link to Spagnola. He has stated repeatedly that he delivered the Spagnola lawn signs, not as a political statement, but as a favor to his ailing mother.

Defendants compare this case to *Lombardi v. Morris County Sheriff's Dep't*, 2007 WL 1521184, 2007 U.S. Dist. LEXIS 37176 (D.N.J. May 22, 2007) (Debevoise, S.D.J.). There, the plaintiff alleged retaliation motivated by his "support" of a fellow officer in an internal affairs investigation. The plaintiff served as the officer's union representative, and his support consisted of "merely standing by [the officer] and being a witness" to an interview. The plaintiff "did not make any comments during the interview." *Id.* at *6, 2007 U.S. Dist. LEXIS 37176 at *17. Quoting *Fogarty*'s rule regarding the "absence of speech," Judge Debevoise ruled that the plaintiff had not engaged in protected speech, and therefore had no cause of action. *Id.* at *6, 2007 U.S. Dist. LEXIS 37176 at *18–*19.

Heffernan seeks to distinguish his case from *Lombardi*, arguing that his purported speech was political in nature. This argument—that Heffernan engaged in political speech in *fact*—is factually dubious, because it contradicts Heffernan's own testimony.[5] It also bypasses the issue of whether Heffernan spoke *at all*, arguing instead that any speech must have been protected because Heffernan undertook it in connection with the Spagnola campaign. (Pltf's Br. Opp. Dfd's Mot. for Summ. J. at 22). Heffernan's real stumbling block here—like that of the plaintiff in *Lombardi*—is his failure to express himself. Heffernan concedes that "[he] did not 'speak.'" (*Id.* at 22–24). Even assuming *arguendo* that Heffernan privately held politically—charged feelings in favor of

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[5] I will discuss separately the argument that Heffernan's superiors *perceived* that he had engaged in protected speech. *See* pp. 12–13, *infra*. Heffernan testified that he wanted Spagnola to win out of friendship, but the only actions at issue here—the pick-up and delivery of the yard sign—were carried out as a favor to Heffernan's mother, not to express Heffernan's thoughts or beliefs. *See, e.g.*, pp. 8–12, *infra*.

Spagnola's candidacy—and he never makes such a contention-he did not say a word regarding Spagnola.

Actual speech, then, is not the issue. I turn now to the issue of whether Heffernan's alleged conduct nevertheless consisted of political expression.

2. Actual First Amendment expressive conduct

Conceding that he did not speak, Heffernan ascribes expressive meaning to his conduct. He argues that he facilitated expression (his mother's posting of a lawn sign) and thereby disseminated the political message of the Spagnola campaign.

Expressive conduct is accorded the same protection as actual speech. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (U.S. 2003). Thus, certain non-verbal acts of communication, if sufficiently expressive or symbolic, will satisfy the speech-in-fact requirement of *Fogarty*. *Herman v. County of Carbon*, 2008 WL 2433107, *4, 2008 U.S. Dist. LEXIS 46551, *11–12 (M.D. Pa. June 12, 2008) (harmonizing *Fogarty* and *Black*) (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002)).

"Expressive conduct exists where 'an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it,'" *Egolf v. Witmer*, 421 F. Supp. 2d 858, 868 (E.D. Pa. 2006) (quoting *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)). That two-part "particularized message" test has been applied to protect, for example, picketing, armband-wearing, flag-waving and flag-burning. *See Johnson*, 491 U.S. at 404, 109 S.Ct. 2533. To put it another, somewhat tautological, way, expressive conduct exists where, "'considering 'the nature of the activity, combined with the factual context and environment in which it was undertaken,' we are led to the conclusion that the 'activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (quoting *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1090 (3d Cir. 1995)); *see Egolf*, 421 F. Supp. 2d at 868 (citing *Tenafly Eruv*). In *Tenafly Eruv*, the Third Circuit underscored that "this 'is a fact-sensitive, context-dependent inquiry,' and [ ] the putative speaker bears the burden of proving that his or her conduct is expressive." 309 F.3d at 161 (quoting *Troster*, 65 F.3d at 1090).

Here, nothing in the evidence indicates that Heffernan's conduct—obtaining a lawn sign for his mother—was intended to convey a message. Nor was Heffernan's conduct, viewed in context, imbued with elements of communication. In many cases, this might present a factual issue for trial. Here, however, Heffernan himself has repeatedly, in sworn testimony, couched his own conduct as a simple favor to his mother, devoid of political motivation or communicative content. He delivered the sign to his mother as a convenience; he did not post the sign on her lawn, or display it in any manner.

If there were any message here, it would be a political one. Heffernan, however, has consistently denied having any political purpose. At his deposition, he testified:

> Q. And the first amendment violation that you're particularly relying upon is the right to post a sign of someone that you were supporting for mayor, correct?
>
> A. I wasn't supporting him for mayor.
>
> Q. I apologize. Let me rephrase that. That your mother was supporting for mayor?
>
> A. Yes.
>
> Q. Now, you couldn't vote for Larry Spagnola, could you?
>
> A. No.
>
> Q. Because you weren't a resident of the City of Paterson?
>
> A. Correct.
>
> Q. But you were, in fact, going to post a sign on your mother's lawn?
>
> A. No. I was going to pick it up and bring it to her. I wasn't going to post it. I didn't have tools with me. My older brother can take care of that.

(Dep. Testimony of Heffernan, Ex. S to Lockman Cert. (ECF No. 197–4) at A199 at 132:23–133:17). In the same deposition, he characterized his relationship to Spagnola as personal, not political:

> Q. Other than the incident that you've referenced in your complaint about getting a sign for your mother, did you do anything else to outwardly support Larry Spagnola in his bid for mayor?
>
> A. No.
>
> Q. Were you working on his campaign?
>
> A. No.
>
> Q. During the time that he was running for this position, did you have conversations with Larry Spagnola?

A. Absolutely.

Q. How often would you speak to him?

A. I spoke to him once or twice, three times a week.

Q. Is he a close personal friend of yours?

A. Yes, he is.

(*Id.* at A193A at 55:24–56:15).

On direct examination at trial, Heffernan confirmed that his relationship with Spagnola was "personal" in nature. (*Id.* at Ex. CC at A–486:8–19). He conceded that he wanted Spagnola to win. He did not testify, however, that he picked up the sign to express his support for Spagnola, or that his actions were was motivated by any desire to see Spagnola win. Rather, the precipitating event was that his mother had "complain[ed] about a few things, and one of them was that somebody had stolen her Laurence Spagnola sign for mayor off the lawn. It was a small one. She asked me if I could reach out to Mr. Spagnola to see if I can [replace it]." (*Id.* at A–487:15–19).

Later, also on direct examination at trial, Heffernan described his response to the accusation that he was campaigning for Spagnola: Heffernan told a colleague that "I was picking a sign up for my mother, and that's all I was doing." (*Id.* at A496:17–18). And upon being advised of his job transfer, he "said to [Lieutenant Papagni] I wasn't politically involved. I was just picking up a sign for my mom." (*Id.* at A499:25–A500:1). Heffernan again emphasized that he "wasn't involved in the campaign." (*Id.* at A501:11).

On cross-examination at trial, Heffernan again confirmed that he intended nothing political:

Q. You agree that even though this was a very heated campaign, you were not involved in Mr. Spagnola's campaign. Correct?

A. Correct.

Q. You agree that you were not ever hanging signs for the Spagnola campaign. Correct?

A. Correct.

Q. So when Aslon Goow said yesterday that you worked on the Spagnola campaign, that would be incorrect?

A. He didn't say that.

Q. Answer my question. If Aslon Goow had said that at one point in time you worked for the campaign, he would be incorrect. Right?

A. Correct.

Q. Because you have repeatedly indicated in deposition transcripts that you were not involved in Mr. Spagnola's campaign. Right?

A. Correct.

(*Id.* at A592:20–A593:11).

In sum, Heffernan never testified that his conduct was spurred by any political motive or belief. He repeatedly testified that his conduct was devoid of political motivation and unconnected to the Spagnola campaign, in which he never participated. No message was conveyed or intended. I give due weight to Heffernan's assertion that he "supported" Spagnola. I read that as a general expression of friendship or sympathy that must be read in context with Heffernan's deposition testimony that he "wasn't supporting [Spagnola] *574 for mayor." I also note Heffernan's statement that he met Mr. Goow on the Paterson street corner because it would "help" the campaign. I take this to refer to logistics; running this errand would spare a campaign worker from doing so. These two statements, in context, are not sufficient to create an issue of fact. And the evidence does not show that Heffernan's actions were intended to, or did, "convey a particularized message." *See Texas v. Johnson*, 491 U.S. at 404, 109 S.Ct. 2533; *Egolf*, 421 F. Supp. 2d at 868. Heffernan has never testified that he expressed, or intended to express, anything. Passively desiring to see a candidate win is not the same as actually expressing support for the candidate or his views.

Moreover, the simple act of transporting, as opposed to posting, a sign does not approach the level of conduct that has been found to be expressive. *See Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (stating that second required showing is that the "likelihood was great that the message would be understood by those who viewed it"). Such conduct was not highly likely to be understood as expressive. Heffernan did not march with the sign or post it anywhere; he loaded it in his vehicle and delivered it to his mother. His conduct was not akin to, for example, visible picketing, wearing an armband, or burning a flag. *See id.* From a First Amendment standpoint, Heffernan's position was not so different from that of the printer who manufactured the sign, or the trucker who delivered the signs to campaign headquarters.

Finally, it is very clear that the context and circumstances of Heffernan's conduct—spurred by his mother's request and unconnected to any aspect of the campaign, and carried out in a straightforward manner without any displaying of the sign—do not imbue his conduct with communicative quality. *See Tenafly Eruv*, 309 F.3d at 160.

Heffernan's conduct cannot be considered expressive under any of the applicable tests. There is no genuine factual issue for trial as to the expressive nature of these acts.

3. Perceived First Amendment speech or expression

I address an argument implicit in Heffernan's papers: that there is a viable First Amendment claim when an employer has retaliated against an employee based on the employer's mistaken *belief* that the employee spoke or otherwise expressed himself.

The United States Court of Appeals for the Third Circuit has ruled out such a theory. A "perceived support" theory of recovery "cannot form the basis of a First Amendment retaliation claim." *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 495 (3d Cir. 2002). *See also Fogarty v. Boles*, 121 F.3d 886, 890 (3d Cir. 1997).

In *Ambrose*, the plaintiff, a police officer, was suspended, allegedly in retaliation for First Amendment activities. The plaintiffs primary retaliation claim was based on freedom of speech: plaintiff had allegedly drafted an affidavit in support of a fellow employee's lawsuit against the department. The Court of Appeals found insufficient evidence, however, that the defendant even knew of the affidavit's existence when it suspended the plaintiff.

That brought to the fore the plaintiff's "alternative theory" that the defendant suspended him because it perceived that he had expressed himself in support of the other officer. Those allegations were murkier. The plaintiff had allegedly entered a locked area of a municipal building after business hours, and had failed to report his movements on his activity sheets. Plaintiff was accused of going there to photocopy documents in furtherance of his fellow officer's lawsuit. Plaintiff, however, denied this; his explanation was that he had gone there only to copy official forms, because his department's copiers were of poor quality. 303 F.3d at 490–492.

Plaintiff thus asserted that he had been suspended because his employer *incorrectly believed* he was copying papers in support of his coworker's lawsuit. The Third Circuit rejected that "perceived support" theory. In the Court's view, actual First Amendment expression is a prerequisite for a free-speech retaliation claim; an employer cannot retaliate for protected conduct unless there was protected conduct in the first place. *Id.* at 494–496 ("'The problem here, as in *Fogarty*, is that there is no protected conduct.") (citing *Fogarty*, 121 F.3d at 890).[6] Thus the absence of actual, protected First Amendment speech or expression by the plaintiff proved fatal to any First Amendment claim.

What remained, said the Third Circuit, was a claim that the plaintiff was fired arbitrarily or by mistake. Such facts might give rise to an employment-law claim of some kind, but not to a constitutional retaliation claim. As held in *Fogarty, supra*, the court "ha[s] never held that it is a violation of the

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[6] *Fogarty* in turn cited *Barkoo v. Melby*, 901 F.2d 613 (7th Cir. 1990). There, a plaintiff was fired based on her employer's mistaken belief that she was behind certain critical newspaper articles. The Seventh Circuit held that there was "no authority for the proposition that her free speech rights are deprived in violation of § 1983 when the speech at issue admittedly never occurred." *Id.* at 619.

Constitution for a government employer to discharge an employee based on substantively incorrect information." *See id.* (quoting *Fogarty*, 121 F.3d at 890 (quoting *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994))).

Under the law of this Circuit, there can be no retaliation claim based on an employer's mere perception that the plaintiff has engaged in protected speech or expression. By his own account, Heffernan did not speak or otherwise express himself in support of Spagnola's campaign; he alleges that Defendants retaliated because the incorrectly *perceived* that he had done so. Under Third Circuit law, there is no such "perceived support" claim.

4. Does Heffernan have a claim for aiding and abetting speech?

Heffernan also argues that he is entitled to First Amendment protection for having aided and abetted the protected speech of his mother, who did intend to post the yard sign in support of Spagnola's campaign. (Pltf's Br. Opp. Dfd.'s Mot. for Summ. J. at 25–27). The only case cited by Heffernan is from the Seventh Circuit, and there is no indication that the United States Court of Appeals for the Third Circuit would adopt the same rule.

In *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933 (7th Cir. 2004), the Seventh Circuit, in a footnote, approved a district court's holding that there may be First Amendment protection for a person's participation "as an aider and a better" of another person's protected speech. *Id.* at 938 n. 1. There, plaintiff, a laborer, had been terminated for insubordination after his employer, the town, learned that he assisted in the posting of a flyer criticizing the town's superintendent of utilities and calling for new leadership. *Id.* at 936–37 The flyer, signed 'concerned resident,' was drafted by another resident, typed by plaintiff at the other resident's direction, and then posted in a local grocery store (plaintiff knew this would occur, but did not post it himself). *Id.* The Seventh Circuit agreed with the United States District Court for the Northern District of Indiana that the plaintiff's failure to speak personally did not necessarily bar his claim.

The Seventh Circuit found this case to be "a far cry from" *Fogarty, supra,* because the plaintiff—unlike the plaintiff in *Fogarty*, or Heffernan here—did not deny that he expressed himself. It was critical to the Seventh Circuit that "[plaintiff's] participation was not in the nature of a disinterested typist, but as an aider and abetter." *Id.* at 938 n. 1. As the district court had noted, "Plaintiff, while not composing the flyer, played a significant role in its publication. Further, plaintiffs termination for insubordination was triggered by his involvement with the flyer regardless of whether plaintiff composed the flyer or was merely Reese's instrument in drafting the document." *Gazarkiewicz,* 264 F. Supp. 2d 735, 740–41, 744 (N.D. Ind. 2003). In concluding that this involvement "constitute[d] speech," neither the district court nor the Seventh Circuit cited any controlling prior authority. *See id.*; 359 F.3d at 938 n. 1.

Adoption of the rule in *Gazarkiewicz,* which has not been adopted elsewhere, would, at the very least, represent a significant expansion of the Third Circuit rule. To the extent it relied on the fact of termination, irrespective of whether the plaintiff expressed himself at all, it would directly contradict *Ambrose* and *Fogarty*. And whatever the merits of such an expansion, it would not be appropriate on the facts of this case. The evidence here does not suggest that Heffernan played any role in the production of the sign, that he intended to adopt its message as his own, or that he intended to act even as the passive "instrument" of the Spagnola campaign when he delivered the sign to his mother.

The Seventh Circuit itself, analyzing the facts of that case, found it to be a "far cry" from *Fogarty*, and ruled on that basis. I agree. Heffernan's case, in my view, is controlled by *Fogarty* and *Ambrose*. Under the controlling law, then, there is no material issue of issue of fact for trial regarding "aiding and abetting" of speech.

In sum, then, applying governing Third Circuit law, I find that there is no genuine issue of fact as to the crucial material issue: whether Heffernan engaged in protected speech or expressive activity. I also find that his aiding and abetting claim is unsupported by the facts or the law. I will grant summary judgment to Defendants, and deny it to Plaintiff, on the claim of retaliation for exercise of the First Amendment right to free speech.

C. Freedom of Association Claim

1. Is a freedom of association claim properly before the Court?

Heffernan also claims that Defendants retaliated against him because he exercised his First Amendment right to freedom of association. Judge Sheridan held a jury trial on that issue and entered judgment for Plaintiff. Later, after Judge Sheridan granted a new trial, Judge Cavanaugh entered summary judgment for Defendants, based solely on a finding that Heffernan did not engage in protected speech. Judge Cavanaugh's ruling did not, however, touch on the freedom-of-association issue. The Third Circuit, reversing and remanding, directed this district court to determine whether a freedom of association claim is properly before this Court.

The Complaint is of course the starting point. The Complaint asserts that "this action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution." (Complaint at ¶ 2 (Doc. No. 1)). Count I (the only count now pending) alleges that Defendants "deprived Heffernan of the privileges and immunities secured to him by the First and Fourteenth Amendments of the United States Constitution and, in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech." (*Id.* at ¶ 40). The Complaint further alleges that Defendants "transferred Heffernan in order to deny Heffernan his First Amendment right to free speech." (*Id.* at ¶ 41). The Complaint does not allege or even suggest that Heffernan supported or affiliated himself with the Spagnola campaign. (*See id.* at ¶¶ 11–42). It does allege, however, that two of Heffernan's superiors in the police department, Papagni and Fraher, *told Heffernan* that he was being transferred "because of his political affiliation." (*Id.* at ¶ 28). That allegation, however indefinitely, at least suggests a freedom-of-association claim.

Heffernan's Trial Brief states that Defendants violated Plaintiff's right to freedom of association, but does not elaborate factually. (Trial Brief at II.B (ECF No. 41)). A motion *in limine* filed by Heffernan alludes to a freedom-of-association claim, but in a confusing manner. (ECF No. 39 at II.C). One subsection of the brief is titled "Freedom of Association," which seems clear enough. But that subsection is contained within a section headlined "Heffernan's *Speech* is Protected by the First Amendment." (*Id.* (emphasis added)). As in the Trial Brief, no factual basis is stated. From the case law cited, however, it might be inferred that Heffernan was asserting a freedom-of-association claim. (*Id.*).

The Final Pretrial Order invokes the First Amendment generally, but does not invoke freedom of association with specificity. The Order states that Heffernan's issues are, *inter alia*: "Whether Defendants ... deprived Heffernan of the privileges and immunities secured to him by the First and Fourteenth Amendments ... in particular, his right to hold employment without infringement of his First Amendment right to freedom of speech"; and "Whether Heffernan was demoted and transferred in direct retaliation for his First Amendment Rights." (Final Pretrial Order (ECF 53–1) at p. 43).

It was based on a broad reading of the Pretrial Order that Judge Sheridan permitted the freedom-of-association claim to go forward. He ruled that "[t]he final pretrial order set up the issue with regard to association and speech ... [and] both parties knew the scope of the issue[s]." (Lockman Cert. Ex. BB at A271). At the outset of trial, Defendants expressed surprise at this. (*Id.* at A270). After trial, they appealed the judgment on the basis of Judge Sheridan's having allowed Heffernan "to proceed on a First Amendment freedom of association claim, when no such claim was pled in Plaintiffs Complaint or within the final pre-trial order." (ECF No. 83). Now, Defendants continue to argue that Heffernan did not properly raise a freedom of association claim. And they argue that they never received 'fair notice' of such a claim in the Complaint, as required by Fed.R.Civ.P. 8.

Examining the foregoing procedural history, I find some indications that Heffernan, when he referred generally to "the First Amendment," intended to include both freedom-of-speech and freedom-of-association theories. The Complaint at least refers to Heffernan's political affiliation as perceived by his superiors. And, as stated above, freedom of association was asserted, however briefly, in the Plaintiffs trial brief and pretrial motions in limine. True, Heffernan could and should have been far clearer. Before trial, Rule 15(a) would have permitted him to resolve all ambiguity by amending his Complaint. He did not. At or even after trial, Rule 15(b) would have permitted an amendment based on an objection, or to conform the complaint to issues that were tried by express or implied consent.[7] Again, Heffernan made no such motion.

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[7] (b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence

If the tortuous procedural history of this matter were a film, we could freeze the frame at one point or another and find, from that viewpoint, that Defendants seem to have a valid procedural point. I must, however, view the case from the perspective of today. This matter is once again at the "pretrial" stage, despite the Court's having once tried the case to judgment for Plaintiff, and once having entered summary judgment for Defendants. Now, after two reassignments, a retrial, and an appeal, this Court has again been asked to decide upon what issues the case should go forward.

From that forward-looking perspective, I will permit the assertion of a freedom-of-association theory, in addition to the freedom-of-speech theory. Such a liberal approach is in the spirit of Federal Rule of Civil Procedure 1, which discourages the forfeiture of issues based on technicalities of pleading, and Rule 15, which permits free amendment of pleadings before trial. I see no particular potential for prejudice to Defendants. Trial, if it were to occur, would occur some months in the future. The facts have been fully explored in discovery. These alterna-

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> would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.
>
> (2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed.R.Civ.P. 15(b).

tive legal theories are just that: different legal lenses through which to view the same fairly simple set of facts. This case was, after all, tried and won before Judge Sheridan on a freedom-of-association theory. At this point, Defendants have "unbelievably clear notice" that plaintiff intends to assert a freedom-of-association claim.[8] I will therefore permit that claim to proceed.

2. The Merits of the Freedom–of–Association Claim

Two basic freedom-of-association rights, if exercised, can give rise to a retaliation claim. (*See* Dfd's Br. in Supp. of Mot. for Summ. J. at pp. 17–18 (ECF No. 189–1)). They are: 1) the right to associate with groups engaged in expressive activity or 2) the right to maintain a political affiliation. *See Ferraioli v. City of Hackensack Police Dep't*, 2010 WL 421098 at *6, 2010 U.S. Dist. LEXIS 8527 at *22 (D.N.J. Feb. 2, 2010). In this case, there is no meaningful distinction between the two. The only claimed "group" is the Spagnola political campaign, and the only "expressive activity" the furthering of Spagnola's political message. Thus the alleged retaliation can only have occurred in response to Heffernan's (a) having affiliated himself with the Spagnola political organization, or (b) having been perceived to have done so.[9]

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[8] *See* Pltf's Br. Opp. Summ. J. at pp. 30–31. Plaintiffs are here quoting the wry observation of District Judge Jed S. Rakoff, who sat by designation on the Third Circuit panel that heard Heffernan's appeal from Judge Cavanaugh's summary judgment ruling.

[9] To put it another way, there is no doubt that the Spagnola campaign was a political organization, and that an affiliation with the campaign might constitute a political affiliation for

I consider first the "in-fact" claim, and then the "perception" claim.

a. Actual political association

Heffernan never pled or otherwise asserted that he had any political affiliation with Spagnola *in fact*. The Complaint alleges only that Heffernan "had a close personal relationship with Spagnola." (ECF No. 1 at ¶ 15). It states that Heffernan's "mother supported Spagnola" (*id.* at ¶ 18), but that Heffernan himself "was not eligible to vote in the 2006 Paterson mayoral election" because he was not a resident. (*Id.* at ¶ 16). Finally, the Complaint alleges that when Heffernan was demoted, ***his superiors said*** it was "because of his political affiliation to Spagnola." (*Id.* at 128). That paragraph, however, does not allege that Heffernan did hold any particular political beliefs or that he *in fact* politically affiliated himself

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purposes of a First Amendment freedom-of-association claim. *Ferraioli* illustrates the political/nonpolitical distinction. There, Judge Chesler made clear that although "political affiliation" is not "limited to affiliation with a political party" and includes causes, ideas, and candidates, such an affiliation must "implicate[ ] the furtherance of political views." *Id.* at *7, 2010 U.S. Dist. LEXIS 8527 at *24 (citing *Aiellos v. Zisa*, 2009 WL 3424190, *7, 2009 U.S. Dist. LEXIS 97542 at *21 (D.N.J. Oct. 20, 2009) (Martini, D.J.)). In *Ferraioli*, although plaintiffs alleged retaliation for exercise of their "right to free speech and ... right to vote," they were referring to a labor union election, not a political campaign. *Id.* at *4, *5, 2010 U.S. Dist. LEXIS 8527 at *16, *18. Thus their claim did not directly pertain to any *political* belief or cause. *Id.* at *7–8, 2010 U.S. Dist. LEXIS 8527 at *24–26. Judge Chesler therefore rejected the plaintiffs' contention that they had pled "a political affiliation."

with Spagnola. It states at most that his superiors believed this, a claim I discuss separately below.[10]

Heffernan has never testified or otherwise asserted that he actually affiliated himself with Spagnola's political organization. He now cites Goow's trial testimony that Heffernan was a "supporter" of Spagnola. (Goow's Trial Testimony, Lockman Cert. Ex. BB at A405:23; Pltf's Br. Opp. Summ. J. at p. 40). Goow's testimony, however, equivocates—and Goow confirmed that, on the day in question, Heffernan was not involved in any political activity but was merely running an errand for his mother. (*See* Goow's Trial Testimony at A406).

Most importantly, *Heffernan himself* asserted that he had no political connection to Spagnola. Any "support" consisted of passive well-wishing based on friendship. Heffernan testified at trial that "I wasn't politically involved. I was just picking up a sign for my mom." (Heffernan's Trial Testimony at A499:25–A500:1). Heffernan reiterated: "I told [Papagni] I wasn't involved in the campaign." (*Id.* at A501:11). Nothing in the record suggests that, at the time he picked up the signs, Heffernan acted from political conviction or sought to associate himself with any political group or movement. He was admittedly friendly with Spagnola, but did nothing with the intent of furthering the goals of the campaign or promoting a message. He merely picked up the sign as an accommodation to his ailing mother, and he has never claimed otherwise.[11] *See* pp. 9–11, *supra* (citing the record).

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[10] Another paragraph alleges that Heffernan "was demoted in direct retaliation for his exercise of protected activities." (*Id.* at ¶ 31). This is most naturally read as referring to his free-speech claim. At any rate, it does not explicitly say anything about affiliation with a political party or campaign.

In short, there is not a material issue of fact as to whether Heffernan in fact affiliated himself with the Spagnola political campaign. Heffernan himself denied it, and—the case having been tried to conclusion—there is an unusually well-developed record on the point. I therefore grant Defendants' motion for summary judgment as to this theory.

b. Perceived political association

What Heffernan did repeatedly say (and others corroborated him) was that Defendants demoted him because they mistakenly believed that his actions betokened an affiliation with the Spagnola political organization. (*E.g.*, Heffernan's Trial Testimony, Lockman Cert. Ex. S at A201, 153:1–6; Pltf's Br. in Opp. at p. 45). In short, his superiors wrongly perceived that Heffernan had fetched the lawn sign as part of his work for the Spagnola campaign. Heffernan invokes cases from the Sixth, First and Tenth Circuits that have recognized a freedom-of-association claim where an employer demotes or fires an employee in retaliation for a political affiliation that is only perceived, not actual. Under the current law of this Circuit, however, adverse action based on such a mistaken belief does not constitute First Amendment retaliation, as a matter of law.

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[11] Contrary to Heffernan's argument, then, this case is nothing like *Perez v. Cucci*, 725 F. Supp. 209, 238–239 (D.N.J. 1989). (Pltf's Br. Opp. Mot. for Summ. J. at pp. 45–46). In *Perez*, Judge Ackerman addressed a patronage system in the Jersey City Police Department, under which promotions and demotions were handed out in accordance with a police officer's personal political affiliations. There, the plaintiff "openly and actively supported the reelection bid of [the] then-Mayor [.] Specifically, the plaintiff attended numerous rallies and meetings. As president of the Hispanic Law Enforcement Society of Hudson County, the plaintiffs name and/or photograph appeared (1) in campaign literature and political advertisements ... and (2) in paid political advertisements in the Jersey Journal ..." 725 F. Supp. at 218. The Court found that, after a new mayor took over, the plaintiff suffered retaliation based on his political affiliations.

As established above, the law in this Circuit is clear, at least as to a First Amendment freedom-of-speech claim. No First Amendment claim arises from retaliation based on an employer's mistaken belief that the employee engaged in protected speech. *Ambrose*, 303 F.3d at 496; *Fogarty*, 121 F.3d at 891; *Myers v. County of Somerset*, 515 F. Supp. 2d 492, 501 (D.N.J. 2007). That requirement of actual speech or actual expression leaves no room for a perceived-support claim. *See* pp. 12–13, *supra*.

It perhaps is an open issue whether the *Ambrose* holding extends to freedom of association, as well as freedom of speech. For these purposes, however, the distinction between a freedom-of-speech retaliation claim and a freedom-of-association retaliation claim does not seem significant. *Ambrose* articulated a general rationale—no First Amendment retaliation without First Amendment conduct—that would apply equally to both. Third Circuit case law articulates no principled basis for treating them differently. Absent such a statement, a proper respect for the letter and spirit of the *Ambrose* holding requires that I apply it in the closely related context of freedom of association. Unless the Third Circuit limits it or reconsiders it *en banc*, I am bound to follow the lead of *Ambrose*.

That said, the United States Court of Appeals for the Sixth Circuit has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012). The issue in *Dye* was "whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue. We believe that they do not." *Id.* at 292. There, four stewards of the Michigan Racing Commission alleged that they had suffered retaliation because their superiors "attributed a political affiliation" to them. *Id.* at 309. There was evidence that the Commissioner, appointed by a Democratic governor, stripped the stewards of benefits because she assumed (wrongly, said the stewards) that they were affiliated with the Republican Party and the governor's Republican challenger. *Id.* at 300–302. The Sixth Circuit held that "[a]n employer that acts on such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.* at 302. The Court of Appeals reversed the district court's award of summary judgment to the defendants, because "retaliation based on perceived political affiliation is actionable." *Id.* at 299–300.

If *Dye* had distinguished *Ambrose* and drawn a principled distinction between freedom of speech and freedom of association for these purposes, I could perhaps consider it as persuasive authority. But it did not. *Dye* rejected the *Ambrose* principle categorically and explicitly disapproved the reasoning of the Third Circuit.[12] To state the obvious, *Dye*'s rationale—that the Third Circuit was wrong—is not one that is available to me, a district judge sitting within the Third Circuit.

More briefly, I will examine a First Circuit case and a Tenth Circuit case upon which *Dye* relied. *Dye* treated them as strong authority for the perceived-support rationale. I am less certain.

The United States Court of Appeals for the First Circuit dropped a tantalizing hint in *Welch v. Ciampa*, 542 F.3d 927, 938–39 (1st Cir. 2008), but ultimately *Welch* provides no basis for me to distinguish *Ambrose*. The *Welch* plaintiff, a police officer, remained silent during a recall election in which his bosses took a keen interest. The First Circuit found, without extended discussion, that there had been no speech, and therefore rejected a free-speech retaliation claim. *Welch* does not cite *Ambrose*, but this holding, as to freedom of speech, is consistent with *Ambrose*.

In the alternative, the *Welch* plaintiff asserted a freedom-of-association claim. That is, the plaintiff alleged that the defendants retaliated against him because he remained neutral and refused to "participate in any campaign activities" in the recall election. *Id.* at 934 ("Welch decided not to participate in any campaign activities related to the recall. His decision to remain neutral was regarded as a betrayal...."). The First Circuit upheld that freedom-of-association claim. I do not think, however, that *Welch* can be read to fully support the *Dye* holding. Nor does it help establish that the reasoning of *Ambrose* should be confined to freedom-of-speech claims.

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[12] In particular, the Sixth Circuit stated that *Ambrose* had misapplied or overextended the Supreme Court's holding in *Waters v. Churchill, supra*. According to the Sixth Circuit, *Waters* was talking about due process standards, not a First Amendment retaliation claim. 702 F.3d at 300 (citing *Waters*, 511 U.S. at 679, 114 S.Ct. 1878; *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1189 n. 9 (6th Cir. 1995) (interpreting *Waters*)). Dye also noted that *Ambrose* and other cases had rejected the perceived-support rationale in the context of free speech, not freedom of association. *Dye* did not suggest any basis for disparate treatment of the two issues, but stated that it did not need to reach the free speech issue. 702 F.3d at 299 n. 5.

To my way of thinking, the holding of *Welch* does not rest on the notion that plaintiffs neutral stance gave rise to a mistaken perception that he belonged to a hostile faction. Rather, *Welch*'s holding is grounded in the well-established proposition that, under the freedom-of-association clause, *refusal to participate in a political campaign is itself protected conduct*: "The freedom not to support a candidate or cause is integral to the freedom of association and freedom of political expression that are protected by the First Amendment." *Id.* at 939 (citing, *e.g.*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)). Indeed, that view of the freedom-of-association clause is in accord with Third Circuit law. *See Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272 (3d Cir. 2007) ("[T]he right not to have allegiance to the official or party in power itself is protected under the First Amendment, irrespective of whether an employee is actively affiliated with an opposing candidate or party.").

Heffernan has never claimed, however, that he was punished for remaining neutral or for refusing to campaign for a candidate favored by his superiors.

He has maintained throughout that he was punished because his superiors incorrectly thought he was campaigning for Spagnola, activity that would have been inappropriate for a public employee. Thus to deny his claim would not be inconsistent with the holding of *Welch* as I understand it.

Welch did not, in so many words, discuss or analyze a perceived-support theory. *Dye* did, however, quote some language from *Welch* that could be read to support such a theory. I think this may have pushed *Welch* too far. Based on the principle that freedom of association encompasses the right not to be punished for declining to join a political campaign or movement, the *Welch* court stated that "active support for a campaign or cause may help the plaintiff meet her evidentiary burden of showing that the adverse employment decision was substantially motivated by her political affiliation.... But neither active campaigning for a competing party nor vocal opposition to the defendant's political persuasion are required." 542 F.3d at 939. So far, so good; the freedom-of-association clause protects the right to refrain from a particular association. *Welch* then stated that "[w]hether Welch actually affiliated himself with the anti-recall camp [was] not dispositive *since the pro-recall camp attributed to him that affiliation*." *Id.* (emphasis added). I would not lightly infer a perceived-support theory from this stray reference. I find it more appropriate to treat this as dictum, for two reasons. First, the point is overdetermined. A plaintiff's failure to actually affiliate with a political movement or campaign is not dispositive, irrespective of any employer's perception, because the First Amendment protects such non-affiliation. Second, it appears that the Court was speaking in the context of proving defendant's *motivation*: specifically, that the alleged retaliation "was substantially motivated," *id.*, by plaintiff's exercise of First Amendment rights. The discussions of the First Amendment's coverage and the required intent may simply have overlapped.

The United States Court of Appeals for the Tenth Circuit considered a variant scenario in *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008). There, adverse action was taken against an employee who allegedly failed to maintain the favored political affiliation. Focusing on the employer's motivations, rather than the employee's true beliefs, the court held: "[T]he only relevant consideration is the impetus for the elected official's employment decision vis-á-vis the plaintiff, i.e., whether the elected official prefers to hire those who support or affiliate with him and terminate those who do not." *Id.* at 1094. Here, too, the court grounded its analysis in Supreme Court authority for the proposition that "Discrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation." *Id.* at 1093 (citing *Rutan*, 497 U.S. at 64, 110 S.Ct. 2729; *Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 350, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). Although relied on by *Dye*, *Gann* did not in fact articulate a perceived support theory.

There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position?[13] Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space. It must be remembered, however, (a) that a First Amendment retaliation claim is not a comprehensive remedy for all employment-related unfairness; and (b) that the context is public employment, where the freedom to engage in political speech and partisan activity can permissibly be curbed.

Nothing about this out-of-Circuit case law persuades me that I am free to depart from *Ambrose* in the freedom-of-association context. The language and logic of *Ambrose* or *Fogarty* do not suggest that the Third Circuit would adopt a different rule for freedom-of-association cases. Accordingly, the letter and spirit of the *Ambrose* holding compel me to reject a perceived-support theory here. Heffernan's alternative theory that Defendants were motivated by a mistaken perception that Heffernan had politically affiliated himself with the Spagnola campaign is barred by the *Ambrose* principle that a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights. As a matter of law, Heffernan's perceived-support allegations do not give rise to a claim of First Amendment retaliation.

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[13] And if the employer must be correct about the employee's political affiliation, how accurate must its perception be? Thus, for example, an employer might accurately perceive that an employee is a Democrat or a Republican, but inaccurately assume that the employee holds certain other beliefs as a result. It may be harder than it appears to get away from the employer's perceptions as a basis for determining whether an employee is in fact affiliated with "the enemy." Political prejudices can be irrational, but no less harmful for that.

Construing the entire record in the light most favorable to Heffernan, I find that there is no genuine issue of material fact as to Heffernan's freedom of association claim, and that defendants are entitled to judgment as a matter of law. *See generally* Fed.R.Civ.P 56(c). Defendants' motion for summary judgment is therefore granted as to Heffernan's freedom-of-association claim.

D. Summary Judgment Motions of the City and Mayor Torres

Defendants have asserted additional grounds for summary judgment specific to the City of Paterson and Mayor Torres. These, however, are moot in light of my disposition of the other issues.

The City of Paterson notes that it cannot be held liable under Section 1983 by virtue of *respondeat superior*. Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a plaintiff who wishes to hold a municipality liable must demonstrate that the constitutional violation occurred pursuant to an official municipal policy or custom. *Id.*; *Bielevicz v. Dubinon*, 915 F.2d 845, 849–50 (3d Cir.1990). (Dfd's Br. Supp. Mot. Summ. J. at 52–56).

Mayor Torres denies that he engaged in any conduct which could make him liable under Section

1983. Chief Wittig, he says, was the sole decisionmaker, there is no evidence to back up Heffernan's allegation that Torres instructed Wittig to demote or transfer him. (Dfd's Br. Supp. Mot. Summ. J. at 56–58)

Plaintiff responds that his allegations against Chief Wittig and Mayor Torres establish a municipal policy, and that his evidence is sufficient to create an issue as to Torre's personal involvement. (Pltf's Br. Opp. Dfd's Mot. Summ. J. at 52–61). *See also Johnson v. Zagori*, 2011 WL 2634044, *3, 2011 U.S. Dist. LEXIS 71267, *7–8 (D.N.J. June 30, 2011) (citing *McKenna v. City of Philadelphia*, 582 F.3d 447, 460 (3d Cir. 2009); *Argueta v. United States Immigration & Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011)).

Because I have found no underlying First Amendment violation, I need not reach the issue of whether Torres and the City would share liability for it. As to these issues, the Defendants' summary judgment motions are dismissed as moot.

CONCLUSION

For the reasons stated above, the motion for summary judgment of Police Chief James Wittig is **GRANTED**; the motions for summary judgment of Mayor Jose Torres and City of Paterson are **GRANTED IN PART and DENIED IN PART AS MOOT**. Heffernan's Motion for Partial Summary Judgment is **DENIED**. The complaint will be **DISMISSED** in its entirety. An appropriate order will follow.

APPENDIX C

United States District Court
for the District of New Jersey

JEFFREY HEFFERNAN, Plaintiff

v.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, and POLICE DIRECTOR MICHAEL WALKER, Defendants.

Civ. No. 06-3882 (KM)

ORDER

THIS MATTER having been opened to the Court, pursuant to Fed. R. Civ. P 56, by Defendant Police Chief James Wittig [ECF No. 186, 188], Defendant Mayor Jose Torres [ECF No. 185, 187], and Defendant City of Paterson [ECF No. 189], through their counsel Lite DePalma Greenberg LLC; Potters & Della Pietra LLP; Dwyer, Connell & Lisbona; Chasan, Leyner & Lamparello, and McElroy, Deutsch, Mulvaney & Carpenter, who submitted a joint brief in support of Defendants' motions [ECF No. 189-1]; and by Plaintiff, through his counsel Mark B. Frost & Associates, on a simultaneous motion for partial summary judgment [ECF No. 190]; and the Plaintiff having submitted papers in opposition to the Defendants' Motion [ECF No. 197]; and the Defendant having submitted papers in opposition to the Plaintiff's motion [ECF No. 196]; and the parties having replied to the each other's opposition papers [ECF Nos. 200, 201]; and the Court having considered the papers, pursuant to Federal Rule of Civil Procedure

78(b); for the reasons stated in the opinion filed on this date, and for good cause shown;

IT IS this 5th day of March, 2014,

ORDERED that the motion for summary judgment of Defendant Police Chief James Wittig is GRANTED; and it is further

ORDERED that the motions for summary judgment of Defendants Mayor Jose Torres and City of Paterson are GRANTED IN PART, but are DENIED IN PART to the extent they seek summary judgment on grounds pertaining to them individually which have been rendered MOOT; and it is further

ORDERED that Plaintiff's Motion for partial summary judgment is DENIED; and it is further

ORDERED that the Complaint be and hereby is DISMISSED WITH PREJUDICE.

/s/ Hon. Kevin McNulty, U.S.D.J.

APPENDIX D

United States Court of Appeals,
Third Circuit.

Jeffrey J. HEFFERNAN, Appellant

v.

CITY OF PATERSON; Mayor Jose Torres; Police Chief James Wittig; Police Director Michael Walker.

No. 11–2843

Argued June 28, 2012

Filed: July 16, 2012.

On Appeal from the United States District Court for the District of New Jersey, District Court No. 2–06–cv–03882, District Judge: The Honorable Dennis M. Cavanaugh.

Alexandra M. Antoniou, Mark B. Frost (Argued), Ryan M. Lockman, Emily K. Murbarger, Mark B. Frost & Associates, Philadelphia, PA, Gregg L. Zeff, Mount Laurel, NJ, for Appellant.

William T. Connell, Albert C. Lisbona, Dwyer, Connell & Lisbona, Michele L. DeLuca, Gary Potters, Potters & Della Peitra, Fairfield, NJ, Mitzy R. Galis–Menendez, Chasan, Leyner & Lamparello, Secaucus, NJ, Joseph Michael Morris, III, Thomas P Scrivo, McElroy, Deutsch, Mulvaney & Carpenter, Newark, NJ, Victor A. Afanador (Argued), Lite, De Palma, Greenberg, Newark, NJ, for Appellees.

Before: SMITH and FISHER, Circuit Judges and RAKOFF, Senior District Judge.*

SMITH, Circuit Judge.

Plaintiff Jeffrey Heffernan appeals from summary judgment entered against him in his First Amendment civil rights case. We will reverse.

Heffernan is a police officer working for the City of Paterson, New Jersey. During the Paterson mayoral election of 2006, Heffernan was asked by his mother to obtain a yard sign for Lawrence Spagnola, a long-time Heffernan family friend and Defendant Mayor Jose Torres' principal opponent. Heffernan was off-duty at the time. Heffernan met with Councilman Aslon Goow, Spagnola's campaign manager, and obtained a sign. When Defendant Police Chief James Wittig learned of this, Heffernan was abruptly transferred out of his position in the Police Chief's office, stripped of his title of detective, and reassigned to a series of allegedly punitive positions.[1] Defendant Wittig admitted that this action was in direct response to Heffernan's alleged political involvement. Defendants Wittig, Torres, and other witnesses concede that off-duty police officers in Paterson are free to engage in political activity. But Wittig claims that an unwritten policy against political involvement existed for officers working in the Chief's office.

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* The Honorable Jed S. Rakoff, Senior District Judge for the United States District Court for the Southern District of New York, sitting by designation.

[1] Plaintiff also alleges that as a result of his actions, his weapons—both duty and personal—were taken from him, and that he was improperly denied a promotion to sergeant.

This case comes to us after a complicated and highly unusual history in the District Court. Heffernan filed this case in the District of New Jersey, seeking compensatory and punitive damages for civil rights violations under 42 U.S.C. § 1983. The parties eventually filed cross-motions for summary judgment.[2] These were denied by District Judge Peter G. Sheridan, and the case proceeded to trial. Despite First Amendment Free Speech arguments being raised repeatedly in pretrial filings, the case went to trial solely on First Amendment Free Association grounds. The jury was charged solely on Free Association and returned a verdict for Heffernan of $105,000 in compensatory and punitive damages.

Up until that point, this case was a relatively straightforward civil rights action. But several months after the jury rendered a verdict in favor of Heffernan, Judge Sheridan retroactively recused himself due to what he perceived as a conflict of interest. The case was set for retrial and assigned to District Judge Dennis M. Cavanaugh. The parties agreed that Judge Cavanaugh should revisit their pretrial motions, including the cross-motions for summary judgment. But each party qualified this agreement. Defendants asked for oral argument on the motions. And Plaintiff asked for the opportunity to file an opposition to Defendants' motion and to supplement the record with evidence obtained in the jury trial. The parties had not been permitted to file oppositions in the original briefing on the motions.

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[2] Heffernan's motion was labeled as a "Motion in Limine," but we believe it is more properly viewed as a Motion for Partial Summary Judgment. The substance of the motion is the same regardless.

Though Judge Cavanaugh initially indicated that he would not revisit dispositive motions, he eventually agreed to do so. He did deny the request for additional briefing. Judge Cavanaugh later granted Defendants' motion and entered judgment in their favor. He concluded that because Heffernan had repeatedly indicated that he was retrieving the sign for his mother and that he was not campaigning for Spagnola, Heffernan was not engaging in speech and was not entitled to the protections of the Free Speech Clause of the First Amendment. Judge Cavanaugh's opinion made no mention of Heffernan's Free Association claim, despite Heffernan having received a jury verdict in his favor on that claim.

We first consider an underlying procedural matter. Heffernan contends that the District Court erred in denying him permission to file an opposition to Defendants' summary judgment motion. Our standard of review for such a procedural matter is abuse of discretion. *See, e.g., Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 220 (3d Cir. 2011) (abuse-of-discretion review for denial of leave to amend); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 n. 26 (3d Cir. 2010) (abuse-of-discretion review for denial of leave to intervene); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1191–92 (10th Cir. 2006) ("Whether a non-moving party has had an opportunity to respond to a moving party's reply brief at the summary judgment stage is a supervision of litigation' question that we review for abuse of discretion."). We conclude that the District Court abused its discretion by barring the Plaintiff from filing an opposition here.

It is extremely unusual in our experience for a District Court to deny permission to file opposition briefs, particularly on a dispositive motion. It is difficult to see how a contested summary judgment motion could ever be decided without opposition briefing, unless the parties agreed to the facts. Issues of fact are quite often key disputes on summary judgment, with the movant asserting that facts supporting its motion cannot be genuinely disputed, and the non-movant responding that certain facts can indeed be genuinely disputed. *See* Fed.R.Civ.P 56(c); D.N.J. L. Civ. R. 56.1(a). The parties will often contest materiality and supporting evidence in a similar manner. *See* Fed.R.Civ.P 56(c)(2) (permitting challenges to supporting evidence). The local rules for the District of New Jersey contemplate that the parties will file both an opposition and a reply to any summary judgment motion. *See* D.N.J. L. Civ. R. 56.1(a). The District Court gave no explanation for its departure from the prescribed practice.

The District Court may have thought that barring additional briefing was justified by Judge Sheridan's refusal to permit oppositions and replies when the motions were initially filed. That conclusion assumes that Judge Sheridan's decision was itself justified. But even if it were, Plaintiff specifically requested additional briefing as a condition of his consent to have the District Court reexamine the summary judgment motion.

Plaintiff had good reason to ask for additional briefing, as the jury trial produced numerous additional facts, all of which should have been considered in re-examining the motion for summary judgment. Defendants contend that the record of the jury trial should not be considered on summary judgment, asserting that the effect of Judge Sheridan's recusal is to turn back the clock to the summary judgment stage and pretend the jury trial never happened. Their source for this dubious proposition is unclear. They cite no federal precedent supporting it. Our cases emphasize the importance of notice and opportunity to respond, and a party has not had a full opportunity to respond if it is unreasonably prevented from offering all relevant, reliable evidence. *See, e.g., Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 223 (3d Cir. 2009) (requiring a party be given the "opportunity to support its position fully" before summary judgment is entered); *Davis Elliott Int'l, Inc. v. Pan Am. Container Corp.*, 705 F.2d 705, 707–08 (3d Cir. 1983) (requiring a party "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" (quoting *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir.1980))). Evidence obtained in a jury trial—even one involving a later recusal—is at least as reliable as other pieces of evidence, such as affidavits, that are routinely considered on summary judgment.

In *Jackson v. State of Alabama State Tenure Commission*, 405 F.3d 1276 (11th Cir. 2005), a public-employee free speech case, the Eleventh Circuit considered a fact pattern similar to the one here. Summary judgment was initially granted, but then reversed by the Eleventh Circuit, with the case remanded and tried before a jury. *See id.* at 1280. The jury verdict was then vacated because a juror had lied about her criminal history. Before the second trial, the trial judge recused himself. *See id.* The new trial judge revisited and granted the summary judgment motion. The Eleventh Circuit affirmed. It specifically held that the district court was justified in granting a summary judgment motion that the Eleventh Circuit itself had previously denied because the district judge "had before him the transcript of the first trial[.]" *Id.* at 1285. Detailing the evidence that supported summary judgment, the Eleventh Circuit explained that "the law of the case did not preclude entry of summary judgment ... on the record as it stood at the end of the first trial." *Id.*

Given that the District Court's conclusion that Heffernan did not speak was based on pre-trial discovery alone, trial testimony that qualifies or undermines that evidence is highly relevant, and should not have been set aside by the District Court. On remand, the District Court is instructed to permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing.

Turning to the substance of the District Court's opinion, we review a District Court's grant of summary judgment *de novo*. *See Beers–Capitol v. Whetzel*, 256 F.3d 120, 130 n. 6 (3d Cir. 2001). Summary judgment is appropriately granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(a). On summary judgment, we must view the facts in the light most favorable to the nonmovant (Plaintiff Heffernan) and draw all reasonable inferences in his favor. *See Beers–Capitol*, 256 F.3d at 130 n. 6; *Big Apple BMW*, *Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). We conclude that the able District Judge erred by failing to address Heffernan's Free Association claim.

Heffernan's Free Association claim clearly appeared in his "Motion in Limine" and his Trial Brief. Judge Sheridan concluded that the Free Association claim was fairly presented and that Defendants had an opportunity to obtain discovery on it. The Free Association claim was tried and Heffernan obtained a jury verdict in his favor, specifically on Free Association. Given these facts, it was reversible error for the District Court to fail to address Heffernan's Free Association claim before entering judgment in favor of the Defendants.

Defendants assert that Heffernan did not adequately plead his Free Association claim and that—at a minimum—they should have been entitled to additional discovery before proceeding to trial on the Free Association claim. We leave these objections for consideration by the District Court. We hold solely that it was error for the District Court to enter judgment in favor of Defendants after discussing only Heffernan's Free Speech claim, considering that Heffernan had previously obtained a jury verdict on his Free Association claim. On remand, the District Court should consider the extent to which Heffernan prosecuted his Free Association claim and whether Defendants timely objected to trial of the Free Association claim. The District Court should also consider the appropriate remedy, whether it be dismissal of the Free Association claim, reopening discovery solely on Free Association, or proceeding to trial.

In light of our conclusion that the District Court's entry of judgment resulted from both procedural and substantive errors, we will reverse. We do not reach the question of the viability of Heffernan's Free Speech claim. The District Court should re-examine that claim in light of the full record and the parties' supplemental briefing.

APPENDIX E

United States District Court,
D. New Jersey

Jeffrey HEFFERNAN, Plaintiff,
v.
CITY OF PATERSON, Mayor Jose Torres, Police Chief James Witting, and Police Director Michael Walker, Defendants.

Civ. No. 06–3882 (DMC)(JAD)
May 23, 2011

DENNIS M. CAVANAUGH, District Judge.

This matter comes before the Court upon Defendants' motion for summary judgment pursuant Rule 56 of the Federal Rules of Civil Procedure and Plaintiff's motion *in limine* for this Court to find as a matter of law that Plaintiff engaged in protected speech. No oral argument was heard pursuant to Federal Rule of Civil Procedure 78. For the reasons stated below, Defendants' motion is **granted** and Plaintiff's motion is **denied as moot**.

I. *BACKGROUND*[1]

In 2006, Lawrence Spagnola ("Spagnola"), a close friend of Plaintiff's family, was running for Mayor of the City of Paterson, New Jersey against incumbent Defendant Mayor Jose Torres ("Mayor Torres"). Compl. ¶¶ 14, 15. At the time, Plaintiff was a Detective assigned to work in the office of Defendant Police Chief James Witting ("Chief Witting"), one of Mayor Torres' political allies. Compl. ¶ 13.

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[1] The facts in the Background section have been taken from the parties' submissions.

Plaintiff took no position on the candidates and was ineligible to vote in the election as he was not a resident of the City of Paterson. Compl. ¶ 16. Id. Though he was not supporting Spagnola for mayor, his mother was. Afanador Certif. Ex. B, at 132:23–133:11.

On April 13, 2006, Plaintiff's mother, a Paterson resident, told Plaintiff that she wished to have a larger Spagnola campaign sign for her front lawn and asked Plaintiff to help her obtain one. Compl. ¶ 19. Accordingly later that day, Plaintiff—while off-duty—planned to meet Councilman Alson Goew, who was distributing Spagnola signs. Afanador Certif. Ex. B, at 60:13–21. While the two men were stopped chatting on a street corner, they were spotted by Officer Arsinio Sanchez, a colleague and friend of Mayor Torres. Afanador Certif Ex. B, at 62:8–24. Plaintiff believes that Officer Sanchez tipped off either Mayor Torres or Chief Witting that Plaintiff was campaigning for Spagnola and that this tip resulted in Plaintiff's demotion to the Traffic Walking Squad on April 17, 2006. *Id*; Compl. ¶¶ 21–26. Plaintiff maintains, however, that he was not campaigning for Spagnola on April 13 and that once he received the sign from Councilman Goew, he dropped it off at his mother's home, not even going so far as to post the sign in her yard. Afanador Certif. Ex. B, at 62:22–25.

II. *STANDARD OF REVIEW*

"A court reviewing a summary judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Gaston v. U.S. Postal Serv.*, 319 Fed. Appx. 155, 157 (3d Cir. 2009). However, "[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c)(2).

Generally, "[a] party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim" at any time "until 30 days after the close of all discovery." Fed.R.Civ.P 56(b), (c). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Cartrett*, 477 U.S. 317, 325 (1986). "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* (citing Fed.R.Civ.P 56(c)).

> When a motion for summary judgment is properly made and supported, [by contrast,] an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so

> respond, summary judgment should, if appropriate, be entered against that party.

Fed.R.Civ.P 56(e)(2). If "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Indeed, "unsupported allegations in [a] memorandum and pleadings are insufficient to repe summary judgment." *See Schoch v. First Fid. Ban corporation*, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56(e) permits "a party contending that there is no genuine dispute as to a specific, essential fact 'to demand at least one sworn averment of that fact before the lengthy process of litigation continues.'" *Id.* (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990)). "It is clear enough that unsworn statements of counsel in memoranda submitted to the court are even less effective in meeting the requirements of Rule 56(e) than are the unsupported allegations of the pleadings." *Schoch*, 912 F.2d at 657

III. *DISCUSSION*

Public employees may sue to enforce their First Amendment rights against retaliation by an employer if "(1) they spoke on a matter of public concern; (2) their interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; (4) the adverse employment decision would not have occurred but for the speech." *Fogarty v. Boles*, 121 F.3d 886, 888 (3d

Cir. 1997). "'A public employee's speech involves a matter of public concern if it can 'be fairly considered as relating to any matter of political, social or other concern to the community '" *Baldassare v. New Jersey*, 250 F.3d 188, 195 (3d Cir. 2001) (quoting *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 885–86 (3d Cir. 1997)).

An essential factor for an actionable claim is that the plaintiff must have engaged in constitutionally protected speech—"in the absence of speech, there has been no constitutional violation cognizable under *section 1983* based on an asserted 'bad motive' on the part of defendant." *Fogarty*, 121 F.3d at 890; *Lombardi v. Morris Cnty. Sheriff's Dep't*, No. 04–5418(DRD), 2007 WL 1521184, at *6 (D.N.J. May 22, 2007) ("The law is clear that 'the absence of speech—in fact, its explicit disclaimer by plaintiff—is fatal to the plaintiff's claim.'" (quoting *Fogarty*, 121 F.3d at 891)). Where there has been no protected speech, "a public employee may be discharged even if the action is unfair, or the reasons 'are alleged to be mistaken or unreasonable.'" *Id.* at 889 (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Waters v. Churchill*, 511 U.S. 661, 679 (1994) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information.").

Defendants assert that summary judgment should be granted because "Plaintiff has admitted repeatedly in pleadings, depositions, and admissions that he did not hang signs or engage in any political activity during the 2006 Re–Election Campaign." Defs.' S.J. Br. 10. The Court agrees. Plaintiff's Complaint provides that he was assisting his mother in acquiring a larger campaign sign. Compl. ¶¶ 14, 17, 19. At no point does Plaintiff allege that he was hanging signs in support of Spagnola's candidacy or that he was supporting Spagnola for mayor. In fact, in a sworn deposition, Plaintiff testified that: (1) "[He] wasn't working on the campaign, period"; (2) "[He] got [his] sign, and [he] went to [his] mother's house, dropped it off ... [and] didn't even put it up"; and (3) "[he] wasn't going to post [the sign] ... [and] didn't have tools" to put it up. Afanador Certif. Ex. B, at 61:6–7; 62: 22–25; 133:12–17 Six months after this testimony, Plaintiff disclosed during a psychological examination that "he picked up a Spagnola lawn sign only because his mother asked him to do so" and that "he took no position on the election."

Plaintiff does not refute these facts and has never claimed that he was doing anything other than transporting a sign for someone else. Therefore, the Court finds that summary judgment is appropriate because there is no genuine issue as to a material fact. In total, the statements above establish that Plaintiff never engaged in any political speech, or any speech at all. Therefore, Plaintiff has failed to state a cognizable claim under § 1983.

IV. *CONCLUSION*

For the reasons stated, Defendants' motion seeking summary judgment is **granted** and Plaintiff's *in limine* motion is **denied as moot**.

APPENDIX F

United States Court of Appeals
for the Third Circuit

No. 14-1610

JEFFREY J. HEFFERNAN, Appellant

v.

CITY OF PATERSON;
MAYOR JOSE TERRES;
POLICE CHIEF JAMES WITTIG;
POLICE DIRECTOR MICHAEL WALKER

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-06-cv-03882)
District Judge: Honorable Kevin McNulty

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, COWEN, and GREENBERG, Circuit Judges[1]

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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[1] The votes of the Honorable Robert E. Cowen and the Honorable Morton I. Greenberg are limited to panel rehearing only.

BY THE COURT,

/s/ Thomas I. Vanaskie
Circuit Judge

Dated: February 13, 2015